In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
GUSTAV E. KISSEL AND THOMAS B. Harned. } No. 390.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.

This brief is filed as supplemental to the brief prepared by the late Solicitor-General, and in reply to arguments presented in brief filed by counsel for defendants, and it is not intended herein to waive any point or argument made in the Government's said original brief.

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I.

The court erred in not sustaining the demurrers to the specific pleas of the statute of limitation; or if he deemed the pleas admissible, in not of his own motion incorporating them into the plea of not guilty and postponing their hearing to the trial of the case; or, in case defendants waived all other defenses, in not submitting the issue presented in the pleas to trial by jury.

Kissel and Harned first filed pleas of not guilty, but these pleas were subsequently withdrawn. (Rec., p. 31.) Thereupon these special pleas of the statute of limitation were filed.

The only ground stated in the demurrers to the pleas was "that the facts as set forth therein in effect constituted a plea of not guilty." (Rec., pp. 54, 55.)

With this simple question before him and without making any inquiry, either in person or by a jury, into the actual facts as to when the offenses alleged in the indictment were committed, the court delivered a lengthy opinion in which he held that, taking the allegations in the indictment as to time as true, the offenses were barred, and therefore ordered the indictment to be quashed as to these defendants.

The sufficiency of the indictment in every other particular was not questioned. The pleas conceded, and the court treated, the several counts as properly alleging the offenses therein mentioned, but made this summary disposition of the case solely upon the face of the indictment. Such action of the court was wholly unauthorized.

In *United States* v. *Cook* (17 Wall., 168, 179) this court held that the defense of the statute of limitation could not be made by demurrer, the reasons for so holding being thus stated:

> Accused persons may avail themselves of the statute of limitations by special plea or by evidence under the general issue, but courts of justice, if the statute contains exceptions, will not quash an indictment because it appears upon its face that it was not found within the period prescribed in the limitation, as such a proceeding would deprive the prosecutor of the right to reply or give evidence, as the case may be, that the defendant fled from justice and was within the exception. *Nor is it admitted that any different rule would apply in the case even if the statute of limitations did not contain any exception, as time is not of the essence of the offense; and also for the reason that the effect of the demurrer, if sustained, would be to preclude the prosecutor from giving evidence, as he would have a right to do, under the general issue, to show that the offense was committed within two years next before the indictment was found and filed.*

It is true the demurrer before the court was to the pleas and not to the indictment, but the court treated the case precisely as if the pleas were demurrers to the indictment, and the effect was exactly the same as if he had sustained them as such. The court can not be permitted to do, by indirection, what he could not have done directly, and thus deprive the United States of the right of proving when the

offenses were actually committed, regardless of the dates alleged in the indictment, which, as held in the *Cook* case, it had a perfect right to do. If the court was right in holding that the pleas were admissible, yet he was wholly wrong in giving them such scope and effect.

But it is now insisted that the court properly pronounced a final judgment, because the United States attorney did not offer to plead over when the demurrers were overruled. The record shows, however, that this contention is a mere afterthought, and no such idea was in the minds of counsel upon either side, or was for a moment entertained by the court.

The judgment pronounced by the court was that the demurrers interposed by the United States to the special pleas—

> be, and the same hereby are, severally overruled; and that said pleas be, and the same hereby are, severally sustained as sufficient in law, and that the said motion be denied, and that the indictment so found and filed July first, 1909, against the defendants above named be and the same hereby is dismissed as to the defendants Gustav E. Kissel and Thomas B. Harned. (Rec., p. 66.)

The judgment was entered twice in substantially the same form, except that as resettled and reentered it recites:

> * * * and the United States having also moved that the said special plea of defendant Harned be treated as a plea of not guilty. (Rec., p. 62, 66.)

An explanation was, however, entered by the court, in which it was recited:

> * * * that at no time prior to the entry of said order and judgment or to the re-settlement thereof, as aforesaid, was any suggestion made by the United States to the court or to the defendants' attorneys that the United States did not intend and elect to stand on its demurrer; but desired to plead over and traverse the special pleas in bar, and that no application or motion was at any time made to the court by the United States for leave to plead over and traverse the allegations of the defendants' special pleas in bar. (Rec., p. 70.)

It can not be seen how the additional recital in the judgment as resettled, or the fact that no suggestion was made by the United States attorney that he did not intend to stand on his demurrer and did not ask that he be permitted to traverse a special plea in bar is material. No formal motion by the United States attorney that the special plea be treated as a plea of not guilty was necessary, as that was the identical point raised in the demurrer, and the court substantially so held, in that he held that the defense could be made under the general issue; and there was therefore nothing for him to do but to order the plea to stand as one of not guilty. *Moreover, the court gave the United States no opportunity for making an application to plead over, because in closing his opinion he said:*

> *The demurrers to the pleas in bar interposed by the defendants Kissel and Harned are over-*

ruled, and judgment dismissing the indictment as to said defendants may be entered. (Rec., p. 61.)

The judgment as originally entered follows precisely the direction here given by the court. *Furthermore, no judgment by default was taken by the defendants and consequently the allegations of the plea can not be considered as taken for confessed.*

However, the opinion of the court shows conclusively that the indictments were dismissed upon the ground that the case as made out upon the face of the indictment was barred by the statute of limitation, and no one had any thought at the time that the indictment was dismissed on the ground that the United States attorney did not ask to be permitted to plead over. In fact, the usual course is, when an order is entered overruling a pleading, for the court to order that a certain time be allowed to enter a traverse; and if this is not done within the required time, then, at the instance of opposing counsel, a judgment by default may be entered.

II.

Nature of a continuing offense, and when the statute of limitation begins to run with reference thereto.

For a proper consideration of this indictment it is important to understand the nature of a continuing offense and when the same is barred by the statute of limitation.

The general rule is thus stated in 12 Cyc., 256:

> Where the offense is continuous, the statute of limitations does not apply where some portion of the crime is within the period, although another portion thereof is not. Thus a prosecution for obstructing a public road may be begun after the statutory period has elapsed, subsequent to the erection of the obstruction, if it still exists within the period of limitations prior to the indictment. The rule also applies to bigamous cohabitation, and according to some of the cases, to conspiracy where it continues.

And thus in Wharton's Crim. Plead. & Prac. (9 Ed.):

> SEC. 321. *Continuous* offenses (such as nuisances, the carrying of concealed weapons, use of false weights, etc) endure after the period of concoction, and as long as the offense by the defendant's action or permission continues to exist. With instantaneous crimes, therefore, the statute begins with the consummation (*Vollendung*); with continuous crimes, it begins with the ceasing of the criminal act or neglect.
>
> SEC. 474. The mere passage of time does not by itself break up into parts an offense otherwise continuous. *If the transaction is set on foot by a single impulse, and operated by an intermittent force, it forms a continuous act, no matter how long a time it may occupy.*

The maintenance of a nuisance is a continuing offense, and prosecution is barred therefor only by

the expiration of the period fixed by statute, after its abatement.

State v. Long, 94 N. Car., 896, 901.
State v. Gilbert, 73 Mo., 20, 21.
State v. Dry Fork R. R. Co., 50 W. Va., 235, 238.
Nashville & Decatur R. R. Co. v. State, 1 Box. 55.

Where it is the duty of one to perform a certain act, as to remove a nuisance, his neglect of such duty may be an offense, and of course a continuing one until the required act is performed.

In 1 Bishop New Crim. Law, sec. 435, it is said:

> There are circumstances wherein men are indictable for what the law calls neglect. It is in the legal sense an act, a departure from the order of things established by law, a checking of action. It is like a man's standing still, while the company to which he is attached moves along, when we say, he leaves the company. On this principle * * *
>
> One under legal obligation to remove a nuisance is indictable when he suffers it to continue.

Also in 2 Id., sec. 1286:

> In one case the court fined the defendant for the non-repair of a bridge, then, learning that it was still out of repair, imposed an additional fine in the same proceeding. But this was held to be unauthorized. It might have delayed sentence, and if the proper repairs

> were not in due time made, imposed a heavy penalty. Or— * * *
>
> A fresh indictment might have been maintained for the continuance of the neglect to repair. And in a larger sense, indictments are sustainable for continuing obstructions in a public way.

The carrying of a concealed weapon is likewise a continuing offense. In *Smith* v. *State* (79 Ala., 257) it was held that:

> Carrying a weapon concealed about the person is necessarily an act continuous in its nature; and where it appears that the defendant while visiting a neighboring plantation and inviting the residents to a dance, exhibited a pistol at two houses some fifty or sixty yards apart, and has been tried and convicted (or acquitted) on the testimony of the persons at one of the houses, he cannot be again prosecuted on the testimony of the persons who saw him at the other house.

The stealing of different articles, though at different times, if but one series of transactions, constitutes but one offense. Thus, in 1 Bishop New Crim. Law, sec. 889, it is said:

> Though the articles are not taken and carried away together, yet if the taking is one continuous transaction, the larceny is one. It is otherwise of disconnected takings, constituting different transactions. Thus—
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> * * * * *
>
> Where the thief, after carrying away an article, came back in about two minutes for a

> second, and in half an hour for a third, and the indictment was for stealing the three, Littledale, J., ruled that the first two might be regarded as one transaction, but that the larceny of the third was a separate offense—the period of half an hour being too long an interval to consider the act as continuing. Still, plainly, such a question is not to be determined by the number of minutes or hours intervening, but by the nature of the transaction and the special facts. Where one was indicted for stealing coal by working for a series of years, through innocent agents, a mine which extended into the lands of many different proprietors, Erle, J., intimated that this was but one transaction, though he did not absolutely so direct, and said: "I should say that as long as coal was gotten from one shaft, it was one continuous taking, though the working was carried on by means of different levels and cuttings, and into the lands of different people."

Queen v. *Firth* (1 Law Rep. Crown Cases Reserved, pp. 172, 176) was a prosecution for stealing gas, and it appeared that the defendant had connected a gas pipe with a main outside the building and had for years continuously drawn gas therefrom, which he used for fuel in a factory. It was insisted that it did not constitute one offense, but it was held to the contrary, and upon this question Chief Justice Bovill said:

> This view would dispose of the case, if there were no taking except when the gas was burnt; but really this difficulty does not arise

here, because the opening from the main to the pipe was never closed, and the taking was, therefore, in fact continuous. This being so, there is no difficulty in the case; but even if it had not been so, the taking would have been continuous. Many instances might be given besides those already mentioned. Take the case of a granary at a railway station, and a man bringing two wagons close to the granary, and taking sacks from time to time, and extending this taking over four or five days. Here there would be different takings at different times, but it would be impossible to treat the taking otherwise than as one continuous act. Another case might be suggested, of a man at work in a house, stealing, on different days, out of different rooms, and taking one article out of one room, and another out of another, at intervals of a quarter of an hour, or an hour, or longer, all during the same job of work. I should rather suppose that this would be one continuous act, and might be included in one indictment.

This case was subsequently reviewed at the Quarter Sessions (11 Cox's Crim. Law Cases, 234), and the court, after discussing the question fully and citing a number of authorities in support of the position previously taken, affirmed the former holding. The facts in one case cited were that the prisoner had extended the workings of his mine and had thus obtained large quantities of coal from forty different persons; his counsel objected that it was not competent for the prosecution to proceed under the indict-

ment for felonies so distinct, but the court held that it was one continuous transaction and constituted in fact but one larceny, though as a matter of convenience the court restricted the case to the stealing of coal under a churchyard.

By section 3 of the act of March 22, 1882 (ch. 47, 22 Stat., 31), it was provided:

> That if any male person, in a territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court.

In *In re Snow* (120 U. S., 274) it was held that this act created a continuing offense and not one consisting of an isolated act.

Section 1 of the act of February 19, 1903 (ch. 708, 32 Stat., 847), known as the Elkins Act, among other things provided:

> It shall be unlawful for any person, persons or corporation to offer, grant or give or to solicit, accept or receive any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the

> tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant, or give or solicit, accept or receive any such rebates, concessions, or discriminations shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars.

It was also provided that a violation of said section might be prosecuted "within the district in which such violation was committed, or through which the transportation may have been conducted." In *Armour Packing Co.* v. *United States* (209 U. S., 56, 73, 76, 77) it was held that the transportation was of the essence of the offense, and that the offense is a continuing one, the court saying:

> The charge is of a single, continuous carriage from Kansas City to New York at a concession from the legal rate for the part of the carriage between the Mississippi River and New York of 12 cents for each 100 pounds so transported. This is a single, continuing offense, not a series of offenses, although it is continuously committed in each district through which the transportation is received at the prohibited rate.

And it was therefore held that the provision with reference to jurisdiction was not violative of article 3, section 2, and the sixth amendment of the Constitu-

tion, which provides that the accused shall have the right to be tried by an impartial jury of the State and district wherein the crime shall have been committed.

Much reliance is had, and the court below based its decision largely upon the case of *United States* v. *Irvine* (98 U. S., 450), wherein it was held that the retention by a pension attorney of moneys which he was required by statute to turn over to the pensioner, was not a continuing offense, but that it was completed when demand was made. The court, in considering this question, said:

> It is unreasonable to hold that twenty years after this he can be indicted for wrongfully withholding the money, and be put to prove his innocence after his receipt is lost, and when perhaps the pensioner is dead; but the fact of his receipt of the money is matter of record in the pension office.

The indictment in that case was brought under section 13, act of July 14, 1864, chapter 247 (13 Stat., 389), which reads as follows:

> That any agent or attorney who shall, directly or indirectly, demand or receive any greater compensation for his services under this act than is prescribed in the preceding section of this act, or who shall contract, or agree to prosecute, any claim for a pension, bounty, or other allowance, under this act, on the condition that he shall receive a per centum upon any portion of the amount of such claim, or who shall wrongfully withhold

> from a pensioner or other claimant the whole or any part of the pension or claim allowed and due to such pensioner or claimant, shall be deemed guilty of a high misdemeanor. * * *

It is clear from the language of this statute that it was intended by Congress that each of the offenses created should be completed by a single act; and it should not be regarded as controlling or be given much weight where the reason there assigned for the construction does not exist and where the statute under construction clearly shows a contrary intent.

If the offenses here under consideration are continuing ones, they are properly charged in the several counts of the indictment as having been committed on December 30, 1903, "and continuously and at all times during said period of six years, to wit, from that day until and on the day of the finding and presentation of the indictment."

In Wharton's Crim. Plead. & Prac. (9th ed.), section 125, it is said:

> In cases in which it is necessary that a *continuando* should be averred (e. g., in cases of continuous bigamy, or continuous nuisance) the periods between which the offense is charged to continue should be specified. In such cases it is enough to say that the offense was committed on a day named, and on certain other days between two days named, or (when the statute requires) that the offense continued between two named days.

The present indictment is in this respect precisely like the one before the court in *In re Snow* (120 U. S., 281).

With these general principles as to the nature of a continuing offense before us, let us consider specifically the offenses charged in the indictment in this case.

III.

First, Fifth, and Ninth Counts.

The first, fifth, and ninth counts of the indictment contain the same allegations and differ only in this: That the first count is for engaging in a conspiracy in restraint of trade and commerce in *refined sugar* among the several States of the United States; the fifth count is for engaging in a conspiracy in restraint of commerce in the purchase and sale of *raw sugar and molasses* among the several States of the United States, while the ninth count is for engaging in a conspiracy in restraint of trade and commerce *with foreign nations* in the purchase and shipment of raw sugar and molasses.

The substance of the first count is as follows:

The American Sugar Refining Company, the corporation defendant, was, and had been for six years next before the finding of the indictment, a corporation organized under the laws of the State of New Jersey, and defendants Thomas, Donner, Senff, Mayer, Frazier, and Parsons had been directors thereof and had controlled and managed its affairs; and Parsons was also its general counsel and Donner

was its treasurer. That said company had for said period of time been engaged in the manufacture of refined sugar and shipping the same into all the States of the United States, and was and had been engaged in commerce among the several States with respect thereto, within the meaning of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and had controlled 90 per cent of the trade therein; that throughout said period of six years the Pennsylvania Sugar Refining Company had been a corporation, organized and existing under the laws of Pennsylvania, and organized for the purpose of competing with the American Sugar Refining Company in the same business; that the Pennsylvania company, on the 30th day of December, 1903, by the expenditure of $2,000,000, possessed an extensive sugar manufacturing plant in Philadelphia, and was provided with the necessary facilities for refining sugar, and was about and intended to engage in said business in accordance with the purpose of its organization; and "throughout the remainder of said period would so have carried on said business, trade, and commerce if it had not been for the unlawful and corrupt conduct of said corporation defendant, of its said directors, and of certain other individual defendants hereinafter named, which is now to be described." (Rec., p. 4.) It is then alleged that the several defendants—

> On said thirtieth day of December, in the year nineteen hundred and three, and continuously and at all times during said period

> of six years, to wit, from that day until and on the day of the finding and presentation of this indictment, each then well knowing all the premises in this indictment aforesaid, in violation of the provisions of section one of said act of Congress, *have engaged* in an unlawful and corrupt conspiracy among themselves in restraint of said trade and commerce in refined sugar among the several States of the United States; that is to say, a conspiracy unreasonably to restrain and eliminate free competition, and prevent all competition, with said corporation defendant, in such trade and commerce, by said Pennsylvania Sugar Refining Company, to the very great injury and detriment, financial and moral, of the people of the United States, and this by and through the unfair, deceitful, unlawful and corrupt means and practices on the part of said corporation and individual defendants which are now here described. (Rec., p. 5.)

The nature and character of the conspiracy is thus described:

1. One Adolph Segal was, on December 30, 1903, the treasurer, and held a majority of the capital stock of the Champion Construction Company, a corporation, and said Champion Construction Company was the owner and holder of 26,000 out of a total of 50,000 of the shares of the capital stock of the Pennsylvania Sugar Refining Company, said Segal holding thereby a controlling interest in the stock of the Pennsylvania company. Defendants, knowing of said fact, conspired to secure from the Champion Construction

Company, through Segal, for the American company, the possession of and the authority to vote the shares of stock in the Pennsylvania company, for at least the term of one year, which was to be accomplished by inducing Segal to borrow, for the term of one year from January 4, 1904, from defendant Kissel, acting as a broker and agent for a lender whose identity was not to be revealed to said Segal, but which lender was in fact to be the defendant American company, the sum of $1,250,000, at 6 per cent, for use in his business as promoter of hotel and other enterprises, said Segal to transfer to Kissel, as further security, full power to vote the 26,000 shares of stock of the Pennsylvania company, without Segal being aware of the fact that the American company would be the real lender of the money, and without his suspecting such designs or having reason to suppose that the lender would have any other desire than to obtain interest on his loan, or any motive for preventing the Pennsylvania company from carrying on its business, and paying dividends in such way as to enable Segal to pay the interest on and the principal of the sum to be borrowed, said Segal being dependent upon such dividends for moneys to pay such interest and principal, which fact defendants knew, and further knew that his financial affairs would be placed in a ruinous condition unless such dividends were paid.

2. When the control of the Pennsylvania company was thus acquired, defendants were to use every means in their power to extend the time of control, by keeping Segal involved in debt, and his affairs in

such condition as to prevent his repaying the debt, and by arbitrarily refusing to accept payment thereof, either before or at its maturity, or to surrender to him the power of control over the Pennsylvania company.

3. When such power of control should be acquired by defendants they were to use the same to prevent the Pennsylvania company from engaging in, in whole or in part, the business, trade, and commerce, for the carrying on of which it was organized, and were thereby to bring about the ruin of the Pennsylvania company by inaction and the destruction of its property and facilities through decay, and thus entirely prevent competition with the American company, which would "but for the act of said corporation and individual defendants in the premises come into existence through the operation of said Pennsylvania Sugar Refining Company."

In pursuance of this conspiracy, it is then alleged that the following acts were committed:

First. On December 30, 1903, defendant Kissel executed and had Adolph Segal execute a written agreement, which is copied into the indictment, and which consisted of a copy of a note to be executed by Segal for $1,250,000 and an assignment by him to secure this loan, the 26,000 shares of the capital stock of the Pennsylvania company, and other assets, and among other provisions, contained the following:

> The borrower agrees that he will so arrange that the absolute voting power for the said twenty-six thousand (26,000) shares of the

stock of the Pennsylvania Sugar Refining Company shall be in the lenders; that the lenders shall have the right to use such voting power as may be suitable to aid or effectuate the purposes hereof; and as the control thereby given is a material part of the consideration for the said note, the borrower further agrees that he will so arrange that, of the seven directors of the said Pennsylvania Sugar Refining Company, four to be nominated by the lenders, of whom one shall be the said Gustav E. Kissel, shall be put in place of four of the present directors, that they, or substitutes to be nominated by the lenders, shall be directors so long as any part of the loan shall remain unpaid; that the control and possession of the property of the said the Pennsylvania Sugar Refining Company shall be in such way and so effectually subjected to the control of the board of directors that so long as the note, or any part thereof, remains unpaid, the refinery of the said the Pennsylvania Sugar Refining Company shall only be run or operated or do business as shall be directed by such board of directors; any expense caused by the possession of the property, or in carrying out this agreement on the part of the lenders, to be added to the said note and to be entitled to the security and to the benefit of all the provisions on the part of the borrower therein contained with like effect as if the same had been specially mentioned therein. (Rec., p. 9.)

Second. On December 30, 1903, defendant Harned signed, as president of the Champion Construction

Company, a consent to the use of the 26,000 shares of capital stock of the Pennsylvania company, as provided for in the instrument executed by Segal and Kissel.

Third. On the same day, the Champion Construction Company, by Harned, its president, executed a power of attorney, authorizing Kissel to vote the 26,000 shares of capital stock of the Pennsylvania company.

Fourth. On the same day Kissel "*did attend a meeting of the board of directors of said Pennsylvania Sugar Refining Company, and as such director did vote in favor of and so secure the adoption of a resolution of said board to the effect that said Pennsylvania Sugar Refining Company should thereafter refrain from carrying on its business until the further order of said board of directors.*"

Fifth. On December 31, 1903, defendant Donner, as treasurer of the American company, signed a check for $250,000, payable to Kissel.

Sixth. On the same day Kissel executed a receipt for said check.

Seventh. On January 4, 1904, the American Sugar Refining Company issued to Kissel three checks, two for $250,000 each, and one for $500,000.

Eighth. On the same day Kissel executed a receipt for said checks.

Ninth. On the same day Kissel signed a statement of the account pertaining to this matter, as it then existed between him and the American company.

Tenth. On the same day Kissel signed his name to a letter addressed to the American company, in which he gave a list of the securities and other documents in his possession relating to this matter, and stating that he had rented a safe in the National Safe Deposit Company, New York, where they were deposited.

Eleventh. On January 5, 1904, the American company, through its president, wrote a letter to Kissel, in which said company stated that it would hold him harmless by reason of the execution of the aforesaid agreement and any action taken thereunder; and further stating that he should look to Segal for compensation.

Twelfth. On May 23, 1905, defendants Donner, Senff, Frazier, and Parsons attended a meeting of the executive committee of the board of directors of the American company.

Thirteenth. On February 13, 1903, defendants Thomas, Donner, Senff, and Mayer attended a meeting of the board of directors of the American company, and voted for and secured the adoption of resolutions that the secretary send the president a letter giving him a copy of the resolutions of the stockholders with reference to the proceedings in the Segal matter, and asking him to cooperate in defending against such proceedings, and agreeing as to him that the company assumed the entire responsibility of what had occurred in the Segal matter, and that it would defend, protect, and indemnify him, and in the event of a suit and possible recovery that it would either pay the same, or, if an appeal be taken, it would

stay proceedings and secure and, if required, make payment; and that a letter be also sent defendant Parsons, the counsel of the company, with a copy of said resolution of the stockholders, and asking him to cooperate in defending against such proceedings, and agreeing that the company assumed the responsibility of what had occurred in the Segal matter, and that it would defend and protect and indemnify him, and in the event of a recovery would pay the same.

Fourteenth. On February 15, 1907, defendant Parsons signed a letter acknowledging receipt of the above-described communication, and stating that he would cooperate in defending any proceedings which might be taken.

Fifteenth. On May 3, 1907, defendant Kissel signed a certain letter in which he transmitted his account of expenses in connection with this matter to the American company.

Sixteenth. On May 10, 1907, the American company settled the account due Kissel, according to the above-mentioned statement.

Seventeenth. On November 12, 1907, defendants Thomas, Donner, Senff, Frazier, Mayer, and Parsons attended a meeting of the directors of the American company.

Eighteenth. On April 19, 1909, defendant Parsons signed a letter addressed to Mr. C. R. Heike, in which he said he would send the advertisement about the Pennsylvania Sugar Refining Company bonds to Mr. Johnson, who had the matter in charge, and that

with the bonds held by Mr. Kissel, he thought that they represented such a holding as to make it undesirable to submit the action to a probably hostile committee, and that if any action were required he would let him know.

The feature of these counts which is especially important, and to which the court's attention is particularly called, is that *the offense charged in each count is not the formation of a conspiracy, but the engaging in the conspiracy described for the purposes alleged*, by the doing of the particular acts described. The overt acts set forth do not bear the same relation to the offenses for which defendants are here indicted, as such acts do to an ordinary conspiracy. They are here alleged as constituting elements of the offense, and not as incidents growing out of the offense of conspiring; that is, it was by and in the commission of these several acts that defendants *engaged in* the conspiracy.

(*a*) *The offenses with which defendants are here charged are continuing ones, and the statute of limitation does not bar a prosecution therefor until the expiration of three years after defendants' participation therein.*

These counts are drawn under the first section of the act of July 2, 1890 (ch. 647, 26 Stat., 209), which reads as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared

> to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

This section is composed of two sentences, the first of which declares what contracts or combinations are illegal, and the second declares the making or engaging in such a contract or combination a misdemeanor. The meaning of the first sentence is perfectly clear. It does not declare merely that it is illegal to *enter into* the contract or combination described, but such contract is declared illegal *during every moment of time from its execution to its abrogation. Both its birth and continued existence are equally prohibited thereby,* and *the continued existence of the illegal act is distinctly recognized.* This fact has a very important bearing upon the construction of the second sentence, which declares it an offense to do either of two things, to either *make* such a contract or to *engage in any such combination or conspiracy.* The doing of the first would undoubtedly constitute a complete offense, as the contract is made when it is executed; but it is just as clear that with reference to the second a series of acts or a continuous condition is contemplated.

As said, the contract or combination is *continuously* illegal; and to *engage* therein clearly refers to a series of acts or a continuous course of conduct

designed to carry out the object of the unlawful combination. If, in compliance with and under such a contract, a manufacturer should fix a certain price upon his goods, and should from day to day maintain and make numerous sales at such price, would it be contended that he could be separately prosecuted for each of such sales? While acts of this kind would be more numerous, yet the same principle must apply to any series of acts designed to perpetuate and enforce the unlawful contract.

The principles of the case above cited, wherein it was held that a taking of gas which was continued for years, and also the mining of coal from different tracts of land through one shaft, which had been continued for several years, constituted but one larceny, are here directly applicable, but with far greater force.

The second meaning of the intransitive verb "engage," as given by Webster, is—

> To embark in a business, to take a part; to employ or involve one's self; to devote attention and effort; to enlist; as to *engage* in a controversy—

and clearly signifies a continuous course of conduct with reference to some particular matter.

But that the offense here charged is a continuing one has been settled by this court in *United States* v. *Trans-Missouri Freight Association* (166 U. S., 290; *Northern Securities Co.* v. *United States* (193 U. S., 197), and *Loewe* v. *Lawlor* (208 U. S., 274). These

cases are referred to at greater length in pages 53 and 54 of the Government's original brief.

It is insisted, however, that inasmuch as these were civil cases, brought under section 4 of said act, they have no binding force in a criminal case, and that the court should adopt a different view in enforcing the penal provisions of the statute. The error of this contention is apparent from a reading of said section 4, which authorizes civil proceedings and which provides that "the several circuit courts of the United States are hereby vested with jurisdiction to prevent and restrain *violations of this act.*" That is, it is the *violations* denounced in sections 1 and 2 of the act which the courts are authorized to restrain, and in determining whether or not the injunctive power of the court should be exercised it was necessary for the court to first determine whether or not a violation existed. The case of *United States* v. *Trans-Missouri Freight Association* and *Northern Securities Co.* v. *United States*, above cited, were both predicated upon this section, and the decrees therein were pronounced upon the theory that the parties to the contracts there in question were engaging in an unlawful combination or conspiracy. In fact, it is difficult to conceive how an unlawful contract or combination of this character can remain in force, and the parties thereto be not at the same time *engaging in* such combination.

Furthermore, the construction of a statute in a civil proceeding is authority for a like construction

in a criminal prosecution. A similar contention to the one here advanced was made in the case of *United States* v. *Keitel* (211 U. S., 370, 392), but it was there said that "because the statute was thus construed in a civil case affords no reason for saying that the authoritative construction is not to be applied in a criminal case," and the same was therefore held applicable to both civil and criminal proceedings.

Furthermore, in *United States* v. *McAndrews and Forbes Co.* (149 Fed., 823, 830) Judge Hough applied in a criminal case a like construction as that given by this court in the cases above cited.

(*b*) *The facts which appear in the pleadings show that the defendants engaged in the unlawful contract or combination within three years before the finding of the indictment.*

No overt act is alleged to have been committed by defendant Harned after he signed the power of attorney authorizing Kissel to vote the 26,000 shares of stock of the Pennsylvania Company on December 30, 1903.

As to defendant Kissel, it appears that on May 3, 1907, he sent a statement of his account to the American Sugar Refining Company (Rec., p. 17), and in that account it is shown that on December 8, 1906, he paid $50 rent for the vault in the National Safe Deposit Company, in New York. In his letter to the same company of January 4, 1904, he stated that as the 1,500 bonds which had been transferred to him

by Segal as part security for the $1,250,000 loan, were voluminous, he had rented safe No. 2588 in the National Safe Deposit Company. It is thus shown that Kissel retained those securities, a list of which was given in his letter addressed to the American Sugar Refining Company of January 4, 1904, in his possession and under his control up to the latter part of 1906. Furthermore, during the early part of that year his statement of account shows that he had paid the expenses of a trip to Philadelphia of one Robinson, to demand payment of $3,000 of Majestic bond coupons, which were a part of the collateral assigned to him by Segal, and had paid $250 to Cravath, Henderson & DeGersdorff for legal services in connection with the loan, had paid to Mr. John G. Johnson $100 as a retainer, and had likewise paid a retainer of $1,000 to Mr. Howard Taylor. Kissel was, therefore, active in this matter, and held the collateral placed in his possession to secure the loan, during the year 1906.

Furthermore, it appears from the allegations of the fourth paragraph of defendant Kissel's plea (Rec., p. 33), that at the instance of one Babcock a receiver was appointed for the Pennsylvania Sugar Refining Company by the Court of Common Pleas No. 4 for the county of Philadelphia, on October 2, 1906, and that the officers and agents of said concern were then enjoined from in any way meddling with, or in any way disposing of, its assets and property; and it appears, therefore, from the allegations of the indictment, supplemented by this paragraph of said defendant's plea, that the Pennsylvania company remained

under the dominion and control of the American company through the directors selected under the contract entered into between Segal and Kissel continuously from December 30, 1903, up to October 2, 1906. The indictment was returned on July 1, 1909 (Rec., p. 31), or less than three years after the Pennsylvania company was, by said receivership, removed from the control of the American company.

The prosecution against defendants is therefore not barred, because—

(1) The continued existence of the Pennsylvania company under the control of the American company, through and by virtue of the contract between Segal and Kissel, and its being thereby continually prevented from competing with the American company, constituted a continuous engaging in the unlawful contract, combination or conspiracy described; and, in consequence of said continual violation of the statute in question, defendants were subject to prosecution at any time within three years after such condition ceased, on October 2, 1906.

The effect of the continuation of this condition by virtue of the order of the board of directors will be hereinafter more fully considered.

(2) These counts of the indictment describe a conspiracy, and although the offense here declared consists in *engaging in* such conspiracy, yet the conspiracy is a material part thereof; and, inasmuch as defendants were coconspirators and joined in the agreement whereby it was contemplated that a certain course of action should be taken whereby the

Pennsylvania company should be permanently and continuously removed from competition with the American company, they thereby constituted each and every one of their coconspirators their agents in bringing about and perpetuating such condition, and they were therefore chargeable with the overt acts of all their coconspirators, and were subject to prosecution at any time within three years after the commission of any act in furtherance of the conspiracy by either of the conspirators. In other words, when one of the parties who entered into the unlawful combination engaged therein by the commission of any act it was the act of all the conspirators, and each and every one was thereby chargeable with engaging in the conspiracy.

IV.

Second, sixth, and tenth counts.

The second count alleges that the defendants

> In and by engaging, during the period of time in the same count specified, and in the manner and under the circumstances and conditions there described, in the unlawful and corrupt conspiracy in that count mentioned, and in and by the committing, at the several times and places in that behalf mentioned, of the several overt acts, in pursuance and to effect the object of said conspiracy, in said first count set forth, unlawfully have knowingly and corruptly monopolized a part of the trade and commerce among the several States, to wit, the interstate trade and commerce in refined sugar. (Rec., p. 19.)

The sixth and tenth counts are the same in language as the second, except that the sixth relates to interstate commerce in raw sugar and molasses and the tenth relates to commerce with foreign nations in raw sugar and molasses.

These counts, therefore, do not charge a conspiracy in any form, *but charge an offense which is entirely distinct in its characteristics from a conspiracy*, the substance of the allegations being that, by means of the conspiracy alleged, and by the holding of the majority of the stock of the Pennsylvania company by the Champion Construction Company and the assignment of said stock to Kissel, and the making of the loan to Segal without revealing to him by whom the loan was made, as alleged, and by thus obtaining control of the Pennsylvania company, secretly and fraudulently, in the manner described, and by immediately upon procuring a majority of the directors of the Pennsylvania company, having passed a resolution to shut down the factory of that company and put it entirely out of business, and by the various acts done by and in consequence of the meetings of the board of directors of the American company set forth in the first count, and by that company assuming all responsibility for the Segal matter and employing counsel to defend any suits that might be brought in consequence thereof, and by each and every one of the other acts set forth in said first count, *defendants, during the entire six years preceding the finding of the indictment, monopolized*

the trade and commerce among the States in refined sugar.

The offense here charged is a continuing one, and he who commits the same was subject to prosecution at any time within three years after such monopoly ceased; and as these counts expressly allege that the monopoly continued during the entire time of six years prior to the date of the finding of the indictment, this offense was not barred by the statute.

These counts are drawn under the second section of the Sherman Act, which reads as follows:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The offense of monopolizing, as here denounced by Congress, is beyond all doubt a continuing offense. There can be no conception of a monopoly which does not extend over a continuing period of time. Nor can it be conceived that one can monopolize any definite line of trade for an infinitesimal length of time. When one monopolizes a trade, he obtains and *continues* in the exclusive control of such trade; and it would be absurd to suppose that Congress

intended to denounce as a criminal act the *obtaining* of exclusive control of a line of trade, when such act within itself would inflict no injury upon the public, and at the same time did not denounce as an offense the *continuation* of such control, when it is by the continuation alone that the evil effect upon commerce is produced. No better illustration can be given than the results which are alleged in the indictment to have been contemplated by the American Sugar Refining Company. Suppose, as is alleged, this company, by obtaining complete control of the Pennsylvania company in the manner alleged, acquired an entire monopoly of the sugar-refining business in the United States, and by the American company's still holding the control of the Pennsylvania company by virtue of the four directors who were elected at the instance of the American company, and who were subservient to its wishes, and by the order of such directors made December 30, 1903, remaining unrevoked, the Pennsylvania company was continuously kept out of business, and thereby the monopoly was continued in favor of the American company. Could it be doubted that at every moment such condition existed the American company was *monopolizing* the sugar business, just as much as it was the moment it first, by the method declared, shut down the operation of the Philadelphia refinery?

No case heretofore cited under "Nature of continuing offenses" presented facts which more clearly constituted a continuing offense than the one here

created by this statute. The condition here presented is even stronger than the principle announced in Wharton's Crim. Plead. & Prac., sec. 474, that—

> If the transaction is set on foot by a single impulse and operated by an intermittent force, it forms a continuous act no matter how long a time it may occupy.

Here the monopoly was set on foot by a single impulse—that is, by the passage and enforcement of the order adopted by the board of directors, directing that the Pennsylvania company cease operation; but this transaction, or continuing condition, was not the result of an *intermittent force*, but was perpetuated by virtue of the order remaining unrepealed—[redacted] the continued application of the very force which in the beginning brought about the monopoly.

It is as clearly a continuing offense as the maintenance of a nuisance, or the mere failure to perform a duty, as the removal of a nuisance or the repair of a bridge, or the carrying of a concealed weapon; and there is much greater reason in declaring it a continuing offense than there was in holding that making connection with a gas pipe and taking gas therefrom for years in succession, or removing coal from a mine from different tracts of land extending through several years, constituted continuing offenses. Furthermore, this act, in declaring it an offense to monopolize any part of a trade or commerce, more clearly contemplated a continuing offense than it was contemplated by the Elkins Act in declaring that every person or corporation who should offer, grant or give,

or solicit, accept or receive any rebates, concessions, or discriminations, should be deemed guilty of a misdemeanor, that such offenses should be continuing ones during the entire period of transportation of the articles for the shipment of which such rebates were made.

Therefore, the prosecution for these offenses was not barred as against either Harned or Kissel. Harned, on behalf of the Champion Construction Company, agreed for the stock of the Pennsylvania company to be used as provided for in the contract between Kissel and Segal, and also executed the power of attorney which enabled Kissel to first vote this stock. Kissel procured the election of the four directors who were subservient to the American company, of whom he was one, and participated in voting the order of the board which shut down the Pennsylvania factory, and put and held the company out of competition with the American company. These acts of both Harned and Kissel were done in pursuance of the unlawful agreement, and with the intent to create the monopoly alleged, *and were the very acts which immediately and directly accomplished the object of the conspiracy. They are, therefore, the very defendants who were responsible for putting this continuing force in motion, and must be liable for its effects as long as it was exerted.*

When one intentionally puts in motion an unlawful force, he is liable for all consequences resulting directly therefrom, regardless of the length of time

such force may continue to operate. This principle is thus expressed in 1 Bish. New Crim. Law, sec. 641:

> One is responsible for what of wrong flows directly from his corrupt intentions; but not, though intending wrong, for the product of another's independent act. If he set in motion the physical power of another, he is liable for its result. If he contemplated the result, he is answerable though it is produced in a manner he did not contemplate. If he did not intend it in kind, yet if it was the ordinary effect of the cause, he is responsible. If he awoke into action an indiscriminate power, he is responsible. If he gave directions vaguely and incautiously, and the person receiving them acted according to what he might have foreseen would be the understanding, he is responsible.

Furthermore, when they entered into the conspiracy with the other defendants, to bring about and perpetuate this monopoly, by the unlawful and fraudulent means described, they thereupon constituted all the other co-conspirators as their agents, and are bound by and responsible for all acts performed by them.

These offenses are properly charged in these counts. As stated in Wharton's Crim. Plead. & Prac., *supra*, the offense being a continuing one, it is proper that a *continuando* should be averred; and it is expressly averred in these several counts that this monopoly continued during the entire six years previous to the finding of the indictment.

The manner by which the monopoly was produced is also particularly charged by declaring that it was the result of the conspiracy and the many acts of the conspirators alleged in the first count, and it was unnecessary to describe particularly in what manner the conspiracy and each particular act contributed to a perpetuation of the monopoly. It was sufficient to allege the facts with such certainty as would place the defendant upon notice, and to charge in unmistakable terms the offense which was thereby committed.

In *United States* v. *Corbett* (215 U. S., 233), wherein defendant, as a bank official, was indicted for making false entries in a report to the comptroller, the entries showed that the condition of the bank was better than it really was. The court below held that the intent to defraud the bank could not be inferred from the making of such entries, but this court held that it did not follow as a matter of law that the fraudulent intent alleged in the indictment could not be entertained in making false entries in a report to the comptroller showing the bank in a better condition than it really was, that being a question which should be determined from all the facts presented on the hearing.

So in the present case, it is unnecessary to assign reasons why the conspiracy and each of the various acts alleged aided and altogether brought about and perpetuated the monopoly, that being a matter for the consideration of the jury upon the trial of the case.

V.

Third, seventh, and eleventh counts.

These counts differ from the second, sixth, and tenth counts only in that instead of charging that defendants actually monopolized the commerce mentioned, they charge that they *attempted* to monopolize such commerce.

These counts were also drawn under the second section of the Sherman Act, and likewise charge a continuing offense. Each of the overt acts alleged was one of a series of acts the object of which was to monopolize commerce; moreover, the conspiracy itself was an *attempt* to create a monopoly, and, as above argued, the continuation of the status of the Pennsylvania company as brought about by the acquiring of control of said company by the American company, and by the enforcement of the resolution of the board of directors, not only monopolized a part of the trade and commerce described, but constituted a continuous attempt at monopolizing such trade and commerce.

VI.

Fourth, eighth, and twelfth counts.

The fourth count alleges that the defendants—

> In and by engaging, during the period of time in the same count specified, and in the manner and under the circumstances and conditions there described, in the unlawful and corrupt conspiracy in that count mentioned,

> and in and by the committing, at the several times and places in that behalf mentioned, of the several overt acts, in pursuance and to effect the object of said conspiracy, in said first count set forth, unlawfully have each knowingly and corruptly conspired with the others to monopolize a part of the trade and commerce among the several States, to wit, the interstate trade and commerce in refined sugar. (Rec., p. 19.)

The eighth and twelfth counts are the same in language as the fourth count, except that the eighth relates to a conspiracy to monopolize commerce among the States in raw sugar and molasses, and the twelfth relates to a conspiracy to monopolize commerce with foreign nations in raw sugar and molasses.

These counts are also based upon the second section of the Sherman Act, and are distinctly *conspiracy* counts.

This act, which makes it an offense to conspire "with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations," differs from section 5440, Revised Statutes, in that it does not require the commission of an overt act as a prerequisite to a prosecution; and it was, therefore, unnecessary that any overt act be alleged in the indictment, it only being required that the nature and scope of the conspiracy, and the method by which it was to be carried into effect, be described with reasonable certainty.

It may be regarded as a rule universally recognized by the authorities, that where the act itself does not require that an overt act be committed before the offender can be prosecuted, it is unnecessary to set forth in the indictment any overt act; and that in case such acts are alleged, it is equally unnecessary that they be proved, and that they may be treated as mere surplusage. (Archbold's Crim. Plead. Evid. & Prac., 1215; 2 Bishop New Crim. Proced. (4 Ed.), sec. 205; *State* v. *Straw*, 42 N. Hamp., 393, 394; *Commonwealth* v. *Judd*, 2 Mass., 329, 336; *Commonwealth* v. *Shedd*, 61 Cush., 514, 516; *Commonwealth* v. *Fuller*, 132 Mass., 563, 566, 567; *People* v. *Richards*, 1 Mich., 216, 224; *People* v. *Dyer*, 79 Mich., 480, 481; *State* v. *Keach*, 40 Vt., 118.)

It necessarily follows as a corollary of this principle that the essential allegations of the indictment may be supported by proof of overt acts entirely independent of and different from those which are particularly set forth in the indictment, and, consequently, that in making out the offense charged in the present indictment against Kissel and Harned, the Government can not be confined to proof of the particular facts alleged as overt acts, but may prove any specific acts in addition thereto or independent thereof, and also any course of conduct upon the part of defendants, or by any or either of their coconspirators, which would tend to show guilt, and would further tend to prove an existence of the offense within three years before the finding of this indict-

ment. As held in the case of *United States* v. *Cook* (*supra*), time is not a material element of the offense, and the Government can prove upon the trial either that the specific acts alleged occurred at other times than those declared in the indictment, or, as stated, may show independent acts which were committed at other times and which would show a continuance of the offense.

The question whether an ordinary conspiracy is a continuing offense or a completed one, when the combination is formed, the one view of which is so ably discussed in the late Solicitor-General's brief, and the other in the brief filed by counsel for defendants, will not be here considered, nor is it deemed of vital importance which view is taken by the court.

It is conceded in the brief filed by counsel for defendants that although the offense of conspiracy is committed by the hatching of the plot, yet the commission of an overt act by the conspirators renews the same; and while it is suggested therein that the overt act renews the conspiracy only as to those who participate in its commission, yet it is finally admitted (on p. 83) that the offense "is subject to renewal and that the renewal may be evidenced by the conscious participation of any of the conspirators in acts done for the purpose of effecting the object of the original conspiracy."

It is well established by the decisions of this court that the act of one conspirator is the act of them all.

The court, speaking through Mr. Justice Story, in *United States* v. *Gooding* (12 Wheat., 469), said:

> In cases of conspiracy and riot, when once the conspiracy or combination is established, the act of one conspirator in the prosecution of the enterprise is considered the act of all, and is evidence against all. Each is deemed to consent to or command what is done by any other in furtherance of the common object.

See also *Lincoln* v. *Claflin* (7 Wall., 132, 138); *Bannon and Mulkey* v. *United States* (156 U. S., 464, 469).

The nature and effect that might probably result from the various overt acts alleged in the indictment are considered on pages 56 to 66 of the brief heretofore filed on behalf of the Government, and will not be here discussed. But this additional observation will be made, that, *when the conspiracy contemplates the bringing about of a permanent condition, which condition will perpetuate a monopoly, a continuation of such a condition is a continuation of the conspiracy, because such condition must be considered as a continuing overt act;* as for illustration, suppose the defendants conspired, as alleged in the indictment, to obtain control of the Pennsylvania company and thereby put it out of business and thus secure a monopoly of the sugar refining business; and in furtherance of this conspiracy obtained control of the Pennsylvania company by having elected a majority of the board of

directors who were favorable to the American company, and in obedience to its behest such directors closed down the Pennsylvania plant and thereby kept it entirely out of business. It can not be doubted that not only would the act in procuring the election of the majority of the board of directors, and the further act on the part of such directors in closing the Pennsylvania company, be overt acts performed in furtherance of the conspiracy, and therefore renewing its existence at such times, *but that the continuation of that condition would of itself be a continuous overt act, which would keep the conspiracy alive for the entire period during which such condition existed.* This is true because the resolution adopted by the board of directors was a continuing force, and the influence and effect of such force was just as much felt and just as effective every moment it remained unrepealed as it was the moment it went into effect. And it was this continuing force which was from day to day, and every moment of time, exerted, that perpetuated the monopoly and kept the Pennsylvania company out of competition with the American company.

Counsel cite a Pennsylvania statute (P. L. March 5, 1903, No. 17), which provides that:

> Stockholders of all corporations of this Commonwealth, wherever residing, who shall be entitled to vote at any corporate meeting or election thereof, shall have and be possessed of the right and power to vote thereat by

> proxy duly executed by the stockholder, either with or without notarial or other acknowledgment, but properly attested by the signature of a witness, and that one person may be constituted and act as proxy for any number of stockholders: Provided, however, that proxies dated more than two months prior to any such meeting or election shall not confer right to vote thereat,

to show that the proxy given Kissel by the Champion Construction Company became invalid two months after it was executed, and that the control of the Pennsylvania company could then have been recovered by the Champion Construction Company. However, this proxy was of no avail except in stockholders, meetings, and the board of directors had already been elected, and had assumed control of the affairs of the company and continued in charge thereof; and, furthermore, the contract which was fraudulently procured by Kissel from Segal, who had control of the Champion Company, expressly provided that the control of the Pennsylvania company should remain in the hands of the board of directors, the majority of whom were to be nominated by the American company, *and this very stock had been assigned to Kissel, and was under his dominion and control, and he had the right and power to vote the same without a proxy.* (See contract on pp. 7 and 9 and list of securities on p. 14.)

VII.

Thirteenth and Fourteenth Counts.

The thirteenth count alleges that defendants, by the conspiracies and acts alleged, engaged in a conspiracy in restraint of commerce among the several States and with foreign nations in the purchase and shipment of materials, to wit, raw sugar and molasses, for the manufacture of refined sugar, and in the interstate commerce of refined sugar manufactured from such materials; and the fourteenth count alleges that by the same means, defendants monopolized and attempted to monopolize a part of the trade and commerce among the several States and with foreign nations in the purchase and shipment of raw sugar and molasses for the manufacture of refined sugar and interstate commerce in refined sugar manufactured from such materials.

The nature of the offenses in these counts are the same as those heretofore considered, and the reasons heretofore given in favor of the sufficiency of the other counts apply equally to these counts.

The judgment of the lower court should therefore be reversed and the case remanded for trial.

JAS. A. FOWLER,
Assistant Attorney-General.

NOVEMBER, 1910.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 390.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

GUSTAV E. KISSEL AND THOMAS B. HARNED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR KISSEL.

WASHINGTON, NOVEMBER 3, 1910.

JOSEPH H. CHOATE,
WILLIAM D. GUTHRIE,
HOWARD S. GANS,
WILLIAM C. OSBORN,
Of counsel for defendant Kissel.

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STATEMENT.

This is a criminal prosecution instituted under the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (c. 647, 26 Stat. 209), commonly known as the Sherman Anti-Trust Act. An indictment was found and filed on July 1, 1909, against The American Sugar Refining Company, Washington B. Thomas, Arthur Donner, Charles H. Senff, John Mayer, George H. Frazier, John E. Parsons, Gustav E. Kissel and Thomas B. Harned. It contains fourteen counts framed under sections 1 and 2 of the act, charging the defendants with engaging in conspiracies in restraint of interstate and foreign trade and commerce, and monopolizing, attempting to monopolize and conspiring to monopolize such

trade and commerce. The defendants Kissel and Harned separately interposed special pleas in bar averring that the alleged offenses charged against them were barred by the provisions of section 1044 of the Revised Statutes in that the indictment had not been found within three years next after the offenses charged therein or any of them had been committed (rec. pp. 32, 52).

The fourteen separate counts are all based upon the same acts and the same transaction. Four of the counts (1, 5, 9 and 13) charge the defendants with engaging in a conspiracy in restraint of interstate or foreign trade and commerce in violation of section 1 of the Sherman Act, whilst the remaining counts (2, 3, 4, 6, 7, 8, 10, 11, 12 and 14) charge them with monopolizing, attempting to monopolize and conspiring to monopolize trade and commerce in violation of section 2 of the act. Further analyzed, the various counts charge seven different forms of conspiracy (1, 4, 5, 8, 9, 12, 13), and seven different forms of monopolizing or attempting to monopolize (2, 3, 6, 7, 10, 11, 14), all of which are based upon different aspects of the same alleged conspiracy and overt acts. The averments of the first count alleging conspiracy in restraint of interstate trade and commerce in refined sugar are either embodied by reference as in counts 2, 3, 4, 6, 7, 8, 10, 11, 12, 13 and 14, or repeated as in counts 5 and 9, and in none of the subsequent counts are any facts alleged which are not alleged in the first count.

The first count alleges that The American Sugar Refining Company for upwards of six years prior to the finding of the indictment was a corporation of the State of New Jersey, carrying on the business of manufacturing refined

sugar from raw materials at its manufacturing plant in New Jersey and of selling and shipping the same to dealers and consumers in all the States, and as such engaged in trade and commerce among the several States, and had and controlled ninety per cent. of such interstate business; that the individual defendants, Thomas, Donner, Senff, Mayer, Frazier and Parsons were directors of such corporation, and controlled and managed its affairs, the said Parsons being its General Counsel and the said Donner its Treasurer; that the Pennsylvania Sugar Refining Company was a corporation of the State of Pennsylvania organized for the purpose of carrying on the same business in competition with the American Company, and that on the thirtieth of December, 1903, it had acquired grounds for and erected a sugar-manufacturing plant and provided necessary facilities and was prepared to engage and intended to engage in and carry on said business and would have done so if it had not been for the unlawful and corrupt conduct of the defendants. The indictment then proceeds to charge that the defendants "on said thirtieth day of December, in the year nineteen hundred and three, and continuously and at all times during said period of six years, to wit, from that day until and on the day of the finding and presentation of this indictment . . . have engaged in an unlawful and corrupt conspiracy among themselves in restraint of said trade and commerce in refined sugar among the several States of the United States; that is to say, a conspiracy unreasonably to restrain and eliminate free competition, and prevent all competition, with said corporation defendant, in such trade and commerce, by said Pennsylvania

Company," and that this was to be done by certain means and practices which are then described. It is alleged that one Adolph Segal, of Philadelphia, was the owner and holder of a majority of the capital stock of the Champion Construction Company, a corporation which itself was the owner and holder of 26,000 shares out of a total of 50,000 shares of the capital stock of said Pennsylvania Company; that Segal was consequently the virtual owner and holder of a controlling interest in the stock of that company; that the defendants were to get from said Champion Company through Segal the possession, use and control of and the authority to vote said shares and thereby secure the power of control over and management of said Pennsylvania Company "for the term of one year at least," which was to be accomplished by inducing the said Adolph Segal "to borrow, for the term of one year from the fourth day of the then next succeeding month of January" (*i. e.*, January 4th, 1904) from the defendant Kissel acting as a broker and as the agent of a lender whose identity was not to be by him or any of the defendants disclosed to said Segal, but which lender was in fact to be the defendant American Company, the sum of $1,250,000 and to transfer to the said Kissel together with other security for the repayment of said sum of money written authority to exercise the power of voting as holder of said 26,000 shares of stock of the Pennsylvania Company; that when the power of control over and management of the said Pennsylvania Company should be so acquired "for the term of one year in the manner aforesaid," the defendants were to use every means in their

power to extend said term and said power of control by keeping the said Segal involved in debt and his affairs in such a condition as to prevent his relieving himself from his obligations to the defendant corporation and by wrongfully and arbitrarily refusing to accept payment of such obligations from him either before or at their maturity, or to surrender to him such power of control over and management of the said Pennsylvania Company; and that when the power of control over and management of the said Pennsylvania Company should be so acquired by the defendants, they were to make use of the same to prevent the said Pennsylvania Company from engaging in or carrying on in whole or in part its business, and were thereby to bring about the ruin of said Pennsylvania Company through inaction and the destruction of its property and facilities through decay, and to eliminate and entirely prevent its competition with the defendant corporation, the said American Company.

The indictment then sets forth a number of overt acts alleged to have been done in pursuance of the conspiracy and to effect its object. They are briefly as follows:

1. That on December 30th, 1903, Kissel, who is described as the agent for certain undisclosed lenders, entered into an agreement with Segal which recited that Segal desired to borrow One million two hundred and fifty thousand ($1,250,000) dollars, on a note running for twelve months, with interest at six per cent. payable quarterly on the 2nd day of April, July, October and January, and that he would deposit as security for the payment of this note and other liabilities certain securities, including $500,000 worth of the bonds and 26,000 shares of the

capital stock of the Pennsylvania Company, the right to the stock and all voting and other rights which belonged to it, together with a power of sale in case of non-payment of the note, and whereby it was agreed by Segal that he would arrange that the absolute voting power of the stock should be in the lenders, that they should have the right to use said voting power as it might be suitable to aid or effectuate the purposes of the contract, that he would arrange that the majority of the directors of the Pennsylvania Company should be nominated by the lenders to continue as such directors as long as any part of the loan remained unpaid, and that during that period the control and possession of the property of the Pennsylvania Company should be effectually subject to the control of the said board of directors and its sugar refinery should be run or operated or do business only as should be directed by the board of directors; and that the borrower should have the right to terminate the loan on the first of October, 1904, and not before (overt act No. 1, rec. p. 7).

2. That on the 30th of December, 1903, Mr. Harned, as president of the Champion Construction Company, executed on behalf of that company a consent to the use of the 26,000 shares of the capital stock of the Pennsylvania Company, in accordance with the terms of the above mentioned contract (overt act No. 2, rec. p. 9).

3. That on the same day Mr. Harned on behalf of the Champion Company executed a proxy and power of attorney to Mr. Kissel, empowering him to vote upon its stock in the Pennsylvania Company, which by its terms

was made irrevocable pending the life of the agreement between Mr. Segal and Mr. Kissel (overt act No. 3, rec. p. 10).

4. That on the same day, Mr. Kissel attended a meeting of the board of directors of the Pennsylvania Company, and as a director thereof voted in favor of and secured the adoption of a resolution of that board "to the effect that said Pennsylvania Sugar Refining Company should thereafter refrain from carrying on its business until the further order of said board of directors" (overt act No. 4, rec. p. 10).

5. That on the 31st of December, 1903, and the 4th of January, 1904, the American Company paid to Mr. Kissel the moneys necessary to enable him to fulfill his obligations under the contract of the 30th of December, 1903, by paying to Mr. Segal the amount agreed to be loaned to him; and that Mr. Kissel furnished to the company on the same days written receipts acknowledging the purpose for which these sums were paid to him (overt acts Nos. 5, 6, 7 and 8, rec. pp. 11–13).

6. That on the 4th of January, 1904, Mr. Kissel executed a written statement of account, addressed to Segal, among the items of which appear loans of December 30th and December 31st, 1903 (overt act No. 9, rec. p. 13).

7. That on the 4th of January, 1904, Mr. Kissel wrote a letter addressed to the American Company, in which he reported that he held for them the various securities and documents received in pursuance of the agreement of December 30th, 1903, and that he had acquired a safe de-

posit box and had deposited those securities therein (overt act No. 10, rec. p. 13).

8. That on the 5th of January, 1904, the American Company caused to be written a letter which set forth that it undertook to hold Mr. Kissel harmless by reason of the execution of the agreement of December 30th, 1903, and any action that had been taken under it (overt act No. 11, rec. p. 15).

9. That on the 23rd of May, 1905, Messrs. Donner, Senff, Frazier and Parsons attended a meeting of the executive committee of the board of directors of the American Company, but what was done at such meeting is nowhere alleged (overt act No. 12, rec. p. 15).

10. That on the 13th of February, 1907, the defendants Thomas, Donner, Senff and Mayer, directors of the American Company, attended a meeting of the board of directors and voted for a resolution to send to the president of the company a letter giving him a copy of the resolution of the stockholders in reference to proceedings in the Segal matter, asking him to cooperate in defending against any such proceeding, agreeing as to him that the company would assume the responsibility of what had occurred in the Segal matter, and that it would defend, protect and indemnify him, &c., and a similar resolution in respect of the defendant John E. Parsons, counsel of the company (overt act No. 13, rec. p. 15).

11. That on the 15th of February, 1907, the defendant John E. Parsons wrote a letter to the secretary of the American Company, in which he stated that for some reason Mr. Earle had delayed proceedings, that the De-

partment of Justice ought to refuse, and that Mr. Parsons hoped it would refuse to aid Mr. Earle's claim, that Mr. Johnson had described the claim as farcical, and that he (Parsons) both on the company's account and on his own, would cooperate in defending any proceedings which might be taken by Mr. Earle (overt act No. 14, rec. p. 16).

12. That on the 3rd of May 1907, the defendant Kissel wrote a letter to the American Company enclosing an account for disbursements for rent of safe deposit vault, legal services, &c. (overt act No. 15, rec. p. 17).

13. That on the 10th of May, 1907, the American Company settled and paid the claim of Kissel for the above-mentioned disbursements (overt act No. 16, rec. p. 17).

14. That on the 12th of November, 1907, the defendants Thomas, Donner, Senff, Frazier, Mayer and Parsons attended a meeting of the directors of the American Company, but what was done at said meeting is nowhere alleged (overt act No. 17, rec. p. 18).

15. That on the 19th of April, 1909, the defendant John E. Parsons wrote a letter in which he referred to an advertisement in regard to the Pennsylvania Company bonds, and stated that he would send such advertisement to Mr. Johnson, who had the matter in charge, and that he thought it undesirable to submit the bonds to the action of a probably hostile committee (overt act No. 18, rec. p. 18).

The defendant Harned is not charged with any act done by him subsequent to January 4th, 1904, and the only act charged against Kissel after that date is that on May 3rd,

1907, he rendered an account for disbursements, which was paid on May 10th, 1907.

There is no allegation in the indictment that the conspiracy contemplated a control which should endure for any definite period beyond the term of one year, nor any allegation that such control actually did continue, nor any allegation that the alleged conspirators agreed to cooperate and continue to act together after July 1st, 1906.

There is no allegation that the proxy on the stock of the Pennsylvania Company was intended to be or was actually renewed or continued in force in favor of the American Company or its agent. Under the Pennsylvania statutes, this proxy dated December 30th, 1903, expired and was of no force and effect after the expiration of two months from its date (Laws Penna., Act of March 5, 1903, No. 17). There is no allegation that the American Company or its agent ever voted or could have voted said stock under said proxy.

There is no allegation that the right to select a majority of the board of directors of the Pennsylvania Company, which by the terms of the contract was accorded to the American Company, was ever exercised by it or that it secured control of the Pennsylvania Company.

There is no allegation that the resolution of the board of directors of the Pennsylvania Company, that it shoud cease its operations until further orders, ever became effective or was acted upon; nor is there any allegation that such resolution was "continuously unrevoked and effective" as stated in the government's brief (pp. 36–37).

There is no allegation that the Pennsylvania Company ever for a single day ceased its operations, or that for a

single day it abstained from competition with the American Company, or was in fact closed or kept closed by any act of the defendants or otherwise.

There is no allegation showing that any act of any of the defendants within the three years continued or renewed the conspiracy or tended to effect the object thereof or had any relation whatever or was in any way germane to the object of the original conspiracy of 1903.

Briefly summarized, the indictment charges that the defendants engaged in a conspiracy to restrain interstate and foreign trade and commerce and to monopolize such trade and commerce by procuring for the American Company the temporary control of the Pennsylvania Company, a potential rival, through an agreement whereby the voting power of the majority of the stock of the Pennsylvania Company was to be vested in the American Company for a period of one year with the intention of protracting that control for an unspecified period beyond that year, and of employing that control to the end of preventing the Pennsylvania Company from engaging in competition with the American Company during the period of control, and, through the decay of its facilities, of entirely eliminating, during the period of control, the competition which otherwise might have arisen. It also charges that the conspiracy was followed by a contract and by acts in pursuance thereof whereby on the 30th day of December, 1903, the control of the majority of the stock of the Pennsylvania Company was vested in the American Company, the right to vote that stock was vested in the American Company for a period of one year, and the board of directors of the Pennsyl-

vania Company was procured to resolve that it should engage in no business until the further order of the board. Everything stated in the indictment contemplated completion within a period long prior to July 1, 1906, or is clearly consistent with such an intention.

Each of the pleas in bar of the defendants Kissel and Harned avers that the alleged offenses charged in the indictment and in each count thereof were barred by section 1044 of the Revised Statutes because the indictment had not been found within three years next after the offenses therein alleged or any of them were committed; that more than three years had elapsed between the commission of the offenses alleged and the finding of the indictment, and that said defendants had not been fugitives from justice within the intent and meaning of section 1045 of the Revised Statutes (pp. 34, 53). Each of said pleas further averred that during the three years the defendant did not directly or indirectly do any act or thing whatsoever in aid or furtherance of or to the effect or tending to effect the object of any conspiracy or conspiracies in restraint of trade or commerce among the several states or with foreign nations; that within said period of three years he was not a member of and did not engage, participate or take part in any such conspiracy or conspiracies; that the acts and things alleged in said indictment to have been done within the period of three years whether by him or by others were not acts or things in aid or furtherance of or to effect or tending to effect the object of any such conspiracy, and that the alleged overt acts and things averred in said indictment to have been done by others within the three years were each

and all of them done without said defendant's participation, knowledge, consent, agreement, authority, or ratification (rec. pp. 32–33 and 52–53). It is also alleged in the special plea of the defendant Kissel that a receiver was appointed for the Pennsylvania Company in October, 1906 (rec. p. 33), and that he took and has ever since retained exclusive possession of its property and exclusive control of its affairs and business.

It will be seen by reference to these pleas that the commission of the original offense in 1903 is not attempted to be denied, and that the only issue tendered was whether or not the alleged offenses had been committed within the three years preceding the finding of the indictment.

To these pleas in bar, the United States demurred on the ground that the facts as set forth therein in effect constituted pleas of not guilty and demanded judgment that the pleas were insufficient in law and be overruled. (pp. 54, 55). The case duly came on for hearing on the issues of law raised by the demurrer of the United States, which were as follows:

1. Whether the defense of the statute of limitations could be set up by special plea in bar.

2. Whether the special pleas in the case at bar were insufficient as amounting to the general issue.

3. Whether the crime of conspiracy under the Sherman Act was essentially a continuous offense, and, if so, whether the pleas in bar were insufficient because failing to allege the abandonment or termination of the conspiracy prior to July 1, 1906.

In considering these questions, the counts charging the

substantive offenses of monopolizing or of attempting to monopolize will not be discussed, for the government has offered no argument to sustain these counts against the plea of the statute of limitations. It must be apparent upon the barest inspection of the several counts charging such offenses that they do not specify any time within three years as the date of the commission of the offenses charged, and that they aver no facts which would suffice to charge the commission of a substantive offense at any date later than the 4th of January, 1904. The learned court below criticized the practice of indicting for conspiracy when the substantive crime is alleged to have been committed (rec. p. 61). In support of such criticism see *United States* v. *McMahon*, 175 Fed. 296, 298; *The Queen* v. *Selsby*, 5 Cox C. C. 497; *Regina* v. *Boulton*, 12 Cox C. C. 87, 93; *United States* v. *Rindskopf* 6 Biss. 259, 266, 267; Wharton, Crim. Law, 10th ed., vol. II, sec. 1346. The discussion in this brief will, therefore, be confined to the conspiracy counts, to which the discussion was limited in the court below and in the opinion of Judge Holt (rec. pp. 56–61).

The court below held the pleas sufficient to set up the the defense of the limitation, and further held on the merits that it did not appear on the record before it that the offenses charged or any of them had been committed within three years preceding the finding of the indictment. It, therefore, overruled the demurrer, and as the United States did not ask leave to plead over, judgment was directed to be entered overruling the demurrers of the United States to the special pleas in bar, sustaining said pleas as sufficient in law, and dismissing the indictment as to the defendants Kissel and Harned.

The United States thereupon took the present writ of error under the Criminal Appeals Act of 1907, 34 Stat. 1246.

The United States having demurred to the special pleas in bar, the facts duly alleged in the pleas stood admitted, and the court below properly considered as before it the question of the sufficiency of the indictment, taken in connection with the pleas, to show the actual commission of any of the alleged offenses within the three years limitation. It is the settled rule in criminal, as well as in civil cases, that when a defendant's pleading is demurred to, he is entitled to challenge the sufficiency of the indictment. *United States* v. *Lawrence*, 13 Blatchford 295, 299; *Rex* v. *Fearnley*, 1 T. R. 316, 320; *State* v. *Sweetsir*, 53 Me. 438, 440; *People* v. *Krummer*, 4 Park. Cr. R. 217, 221; *Commonwealth* v. *Trimmer*, 84 Pa. St. 65, 70; Archbold's Crim. Plead., Evid. & Prac., 23rd Eng. ed., p. 167, Bishop's New Crim. Proc., vol. 1, sec. 777; Wharton's Crim. Plead. & Prac., 9th ed., sec. 402. The government's theory substantially was that notwithstanding the allegations of the plea, which it admitted by its demurrer, the offense of conspiracy was so essentially a continuous crime that the plea should have alleged the abandonment or termination of the original conspiracy at a time beyond the three years of the limitation.

The Act of July 2, 1890, known as the Sherman Act, under which the indictment in the case at bar was found, defines the crimes as follows (26 Stat. 209):

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every

person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

This criminal statute is to be construed in connection with section 1044 of the Revised Statutes, which reads as follows:

"No person shall be prosecuted, tried, or punished for any offense, not capital, . . . unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed."

The question on the merits, therefore, is whether it appears on this record that the indictment was found within three years after the alleged offense of conspiracy was committed.

The argument will be divided as follows: (I) the right to set up the defense of the limitation by special plea, pp. 17–33, (II) an analysis of the government's contentions on the merits, pp. 33–44, (III) the nature of the offense of conspiracy, pp. 45–83, (IV) the alleged overt acts, pp. 84–100, (V) the sufficiency of the pleas as to form, pp. 100–106, (VI) the objection of duplicity, p. 107, and (VII) the request of the government to be allowed to plead over, pp. 108–113.

I.

THE DEFENSE OF THE STATUTE OF LIMITATIONS MAY BE AVAILED OF BY SPECIAL PLEA IN BAR.

The first question which the government presents for the consideration of the court is whether the defense of the limitation in criminal cases under section 1044 of the Revised Statutes can be set up by special plea in bar. In the printed brief submitted by the government to the trial court, the following was stated:

> "It is conceded by the Government that the statute of limitations can be set up by a special plea in bar."

It was at first the practice in the lower federal courts to permit a defendant to raise the defense of the limitation preliminarily by demurrer and thereby avoid further prosecution and trial, although it was recognized that it could also be set up by special plea. *United States* v. *Watkins*, 3 Cr. C. C. 441, 551; *United States* v. *Six Fermenting Tubs*, 1 Abb. U. S. 268, 271; *United States* v. *Dustin*, 25 Fed. Cas. No. 15,012, p. 946; *United States* v. *Shorey*, 27 Fed. Cas. Nos. 16,281 and 16,282; *United States* v. *Coggin*, 3 Fed. 492.

This practice was overruled and the rule of federal procedure applicable in criminal cases was settled by this court at the December term, 1872, in *United States* v. *Cook*, 17 Wall. 168. In that case Mr. Justice Clifford said (at p. 179):

> "Accused persons may avail themselves of the statute of limitations by special plea or by evidence under the general issue, but courts of justice, if the statute contains exceptions, will not quash an indict-

> ment because it appears upon its face that it was not found within the period prescribed in the limitation, as such a proceeding would deprive the prosecutor of the right to reply or give evidence, as the case may be, that the defendant fled from justice and was within the exception."

This authoritative declaration of the proper rule of procedure has never been qualified or limited by the court. On the contrary, the practice has been repeatedly sanctioned. Thus, in *United States* v. *Norton*, 91 U. S. 566, and *United States* v. *Hirsch*, 100 U. S. 33, the defense of the limitation was set up by special plea in bar to which the United States demurred, and upon such demurrer the whole controversy was determined. So, also, in the case of *United States* v. *Irvine*, 98 U. S. 450, there was a special plea in bar, setting up the defense of the limitation, which was sustained. In the more recent case of *United States* v. *Hewecker*, 79 Fed. 59, 60; 164 U. S. 46, the defense of the limitation was set up by special plea, to which the United States demurred, and the demurrer was overruled by the trial court. In the still more recent case of *United States* v. *Brace*, 149 Fed. 874, 876, the defendant filed a special plea of the statute of limitations, to which the United States demurred, and upon this demurrer the controversy was decided.

In Bishop's New Criminal Procedure, vol. 1, sec. 799, sub. 5, the author says:

> "The statute of limitations may be pleaded specially, and sometimes it is. Yet this defence is permissible under the general issue."

The following is a list of additional federal cases in which the defense of the statute of limitations was actually set up by special plea in bar: *Adams* v. *Woods*, 2 Cranch.

336; *United States* v. *Wells*, 163 Fed. 313, 314; *United States* v. *Comstock*, 162 Fed. 416; *Ex parte Townsend*, 133 Fed. 74, 75; *McGlinchy* v. *United States*, 4 Cliff. 312, 314; *Perkins v. United States*, 4 Cliff. 321, 322; *United States* v. *Maillard*, 4 Ben. 459, 460; *United States* v. *Wright*, 28 Fed. Cas. No. 16,770, p. 789; *United States* v. *Shorey*, 27 Fed. Cas. No. 16,280, p. 1070; *Stimpson* v. *Pond*, 2 Curtis C. C. 502, 503; *United States* v. *Platt*, 27 Fed. Cas. No. 16,054a, p. 546; *United States* v. *Mayo*, 1 Gall. 397; *United States* v. *Slacum*, 1 Cranch C. C. 485. It is true that some of these cases were civil suits for penalties; but when it is recalled that in such suits the defense of the statute of limitations is open to the defendant under the general issue (Story, J., in *Parsons* v. *Hunter*, 2 Sumn. 419, 426), the precise analogy upon this point between penal civil suits and criminal prosecutions is apparent.

The same rule as to setting up the defense by special plea once obtained in the courts of New York (see *People* v. *Roe*, 5 Parker C. R. 231), and may be presumed to have been the law which existed when the Constitution of the United States was adopted in 1789. *United States* v. *Reid*, 12 How. 361. It is, however, no longer permissible in New York under the Code of Criminal Procedure, sec. 332, which abolished the common law rules as to special pleas and limited pleas in bar to the plea of former judgment of conviction or acquittal, which may now be pleaded with or without the plea of not guilty.

The suggestion in the government's brief that under the English practice at common law there are no precedents to be found of pleas in bar setting up the defense of the statute

of limitations is entirely immaterial, for the reason that there was in England prior to the nineteenth century no limitation of prosecutions in criminal cases except under the Treason Act of 1695. Wood on Limitations (Gould's 3rd ed.) sec. 28; Banning on Limitation of Actions (Brown's 3rd ed.) p. 253; Stephen's History of the Criminal Law of England, vol. II, pp. 1, 2. So, likewise, as to the fact that in New York, Canada and other jurisdictions, the statutes which regulate criminal procedure do not permit the defense of the limitation to be set up by special plea in bar. That may furnish an argument to be addressed to Congress for the purpose of having the law changed, but is not a ground upon which this court should be asked to overrule and set aside its own decision and the long-established practice thereunder.

The cases which have held that a defendant cannot at the same time plead the general issue together with a special plea of confession and avoidance do not in any way question the right to interpose one or the other plea at the election of the accused. The only reason why the accused cannot do both is the rule of the common law against double pleading in criminal cases. Had the statute of 4 Anne, c. 16, §§ 4 and 5, which permitted double pleading in civil cases, not expressly excluded criminal cases, double pleading would have been allowable at common law in criminal cases. Thus, in the case of the *United States* v. *Shorey*, 27 Fed. Cas., No. 16,280, p. 1070, the Circuit Court, including Mr. Justice Clifford, said:

> "Special matter which is in law a bar to an indictment, may in certain cases be so pleaded in misdemeanors, but the rule is well settled that the defendant cannot plead specially in bar of the indict-

ment if he pleads the general issue, as double pleading is unknown in criminal procedure. 1 Starkie, Cr. Pl. 335; *Heyrick* v. *Foster*, 4 Term R. 701."

So far as a careful investigation has disclosed, there is no federal case holding that a defendant in a criminal proceeding may not set up the defense of the statute of limitations by special plea in bar. The fact that the defense may also be availed of under the general issue, in no way militates against the right to present it by special plea in bar if the accused desires to do so. The suggestion that the right to plead specially might be abused for purposes of delay would apply equally to the right to demur whenever the question sought to be raised by demurrer could also be raised under the general issue. The right to demur has existed for many years, and there is no evidence or serious complaint that it has been abused. But, however that may be, the possibility of abuse is not the test, any more than the convenience of the prosecution is the measure of the legal rights of the defendant.

The argument of the government that to permit a special plea of the limitation might involve two trials, if a sound objection, would apply to all pleas in bar, for in each case the nature and circumstances surrounding the alleged commission of the crime might have to be proved. Thus, the plea of former jeopardy, or of immunity, or of pardon might well involve the necessity of proving that the offense charged and the one for which the defendant had obtained immunity or pardon or had suffered jeopardy were identical.

The government further urges in its brief (p. 26) that it is quite impossible to prove when an offense was committed without proving the actual occurrence of all the

facts essential to constitute the offense. This argument, if a sound objection in this case, would deprive every accused person of the right to set up the defense of limitation or immunity or former jeopardy by special plea in bar.

But is it true that all the facts would have to be proved in the present case on the trial of the plea in bar as fully as on the trial under the general issue? Quite the contrary would seem to be the fact. In the first place, the original conspiracy, its nature, scope and intent as alleged in the indictment and evidenced by documents alleged in the indictment would stand admitted on the trial of the special plea. No fact alleged in the indictment—not even the doing of the overt acts—would have to be proved. They would stand admitted for the purposes of such a trial. All that would be necessary would be to show how and in what manner the offense of conspiracy had been renewed, or how and in what manner the alleged overt acts, as matter of fact, could tend to effect the object of the original conspiracy. The issue on a traverse of the plea would, therefore, necessarily be far simpler and much narrower than if the prosecution had to prove all its allegations as on a trial under the general issue.

Aside, however, from the force and effect of the precedents above cited, which recognize the right to avail of the defense and protection of the limitation by special plea in bar, it is submitted that such a defense is essentially one which ought to be set up and disposed of by special plea in bar rather than on the trial of of the general issue if an accused is advised so to plead. The defense of the limitation presents an issue that

should be preliminarily disposed of, so that, if successful, the expense, delay and harassment of a trial on the merits may be avoided because wholly unnecessary and legally unwarranted. In the majority of cases, such a procedure will tend to the due, orderly and humane administration of the criminal law, and, if the defense be well founded, the expense and delay of a trial on the merits may be thus avoided—a result merciful and just to the accused and convenient to the prosecution. It is true that frequently the point is so doubtful that an accused person prefers to put the prosecution to its proof of the commission of the alleged crime and to reserve the defense of the limitation for the trial, and that the law in its solicitude to secure to an accused every legal protection will permit this to be done; but where an accused is advised that, as matter of law, the crime, if ever committed, is clearly barred, he ought to have the right to raise that single issue by special plea so as to obtain a prompt and inexpensive termination of the prosecution against him, just as he has the right to raise other questions of law preliminarily by demurrer and thereby prevent further prosecution. Ordinarily, indeed, it will be desirable that the government should not be compelled to go to the expense of preparing and trying a case which could and should be promptly disposed of on a special plea of the limitation. If a special plea in bar be interposed, the case can be at once disposed of on demurrer or traverse to the plea. If the facts are correctly alleged in the plea, the issue is narrowed and simplified to one of law and can be much more readily disposed of than if the point were reserved for a trial on the merits before a jury. There are ex-

ceptional cases where the trial of issues of fact under such a plea in bar may be necessary, but exceptional considerations of special convenience or inconvenience cannot fix or determine the general rules of pleading and practice applicable to all cases. The accused is not to have one rule of pleading applied because the prosecutor thinks the case simple and another and different rule if the prosecutor happens to think it complicated.

The defense of the statute of limitations is on principle of the same general character and nature as the plea of former jeopardy or immunity or pardon. It is essentially a plea in bar of further prosecution. It confesses the crime, but relies on a statutory or constitutional exemption in avoidance. The settled rule at common law was that the defense of former jeopardy, *i. e.*, autrefois acquit or autrefois convict, had to be specially pleaded and could not be availed of under the general issue or by motion in arrest of judgment. Wharton Crim. Pl. & Pr., 9th ed., §477; Bishop's New Criminal Procedure, vol. I, §§742, 799, sub. 3, and 806. It is true that special pleas were generally confined to former jeopardy and that no precedents are to be found at the early common law of pleas in bar setting up the defense of the statute of limitations, but the reason is, as stated above, that there was in the English common law no limitation of criminal prosecutions. On principle and by analogy, it is certain that if the defense of limitation were as ancient as the defense of autrefois convict, the common law would also have held it to be available only under a special plea in bar. But special pleas were especially dangerous at the common law, because of the refusal of the

courts to permit an accused to plead over if he failed to maintain his plea. As criminal procedure became more and more humane, the courts, therefore, allowed defendants to avail themselves under the general issue of defenses which should more properly or logically be presented by special pleas in bar. Thus, the defense of immunity was held to be available under the plea of not guilty. *Regina* v. *Skeen*, 8 Cox C. C. 143, 153, 158. This indulgence, however, was not intended in any way to affect the substantial right of an accused to plead specially and thereby bar further prosecution and jeopardy.

A further consideration in support of the practice of filing special pleas in bar setting up the defense of the limitation is afforded by the act of March 2, 1907, itself. At the time this act was passed, Congress clearly contemplated the practice of filing special pleas in bar in criminal cases, for the act expressly authorizes appeals by the United States direct to this court—

> "From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy."

This act of Congress, it is generally understood, was proposed and drafted by the Department of Justice specially to meet such cases as *United States* v. *Armour & Co.*, 142 Fed. 808, where a special plea of immunity had been sustained. There is no essential difference between the defense of the limitation and the defense of immunity, for each is based on a statutory amnesty and seeks to bar further prosecution, and in either case it might be necessary to take considerable testimony. In the debates in Congress, defenses setting up the statute of limitations and

immunity were specifically referred to in connection with this clause relating to special pleas in bar. Cong. Rec. 59th Cong. Sess. II, vol. 41, part 4, pp. 2194, 2749, 2753, 3044. The Criminal Appeals Act might be deprived of much of its intended scope and usefulness if it were now held that such a defense as limitation or immunity could not be set up by special plea in bar. If it be the true rule of procedure that these defenses must hereafter be set up under the general issue and tried at the same time as the trial of the plea of not guilty, then the United States can never appeal in such cases, and the act of 1907 will be very much narrowed and its operation greatly limited. The only way in which the purpose of Congress can be reasonably effectuated is to permit special pleas in bar raising such questions as limitation, immunity and former jeopardy, so that, if serious questions of law are involved and decided in favor of the accused, the government may promptly bring the questions involved before this court for review.

It is further submitted that section 1044 of the Revised Statutes should be liberally construed in favor of individual rights, and in that light such procedure should be favored as will tend to save an accused person from prosecution and trial, if he duly claims the statutory amnesty. In Wharton's Cr. Pl. & Pr., 9th ed., sec. 316, the author says:

> "Hence it is that statutes of limitation are to be liberally construed in favor of the defendant, not only because such liberality of construction belongs to all acts of amnesty and grace, but because the very existence of the statute is a recognition and notification by the legislature of the fact that time, while it gradually wears out proofs of innocence, has assigned

> to it fixed and positive periods in which it destroys proofs of guilt. Independently of these views, it must be remembered that delay in instituting prosecutions is not only productive of expense to the State, but of peril to public justice in the attenuation and distortion, even by mere natural lapse of memory, of testimony. It is the policy of the law that prosecutions should be prompt, and that statutes enforcing such promptitude should be vigorously maintained. They are not merely acts of grace, but checks imposed by the State upon itself, to exact vigilant activity from its subalterns, and to secure for criminal trials the best evidence that can be obtained."

The above language of Dr. Wharton has frequently been quoted with approval by the courts. *Beattie* v. *People*, 33 Ill. App. 651; *Lamkin* v. *People*, 94 Ill. 501. See also Bishop on Statutory Crimes, 3rd ed., sec. 259; *Commonwealth* v. *Haas*, 57 Pa. St. 443; *People* v. *Lord*, 12 Hun 282; *People* v. *Austin*, 63 N. Y. App. Div. 382; *Moore* v. *State*, 43 N. J. L. 203; *State* v. *Asbury*, 26 Tex. 82.

In Bassett on Crim. Plead., 2nd ed., secs. 184, 64, it is said of the statute of limitations that

> "It would seem that the statute in its effect, as a bar, is mandatory; so that its running being disclosed the accused cannot waive the bar. . . . The statute is based upon public policy, and individuals cannot repeal it; it not being for their peculiar benefit but in the interest of the public. . . .
>
> "Such statutes are founded on public policy, as statutes of repose, . . . not to be evaded by construction, but to be regarded with favor by courts and so liberally interpreted as to advance the policy they are designed to promote."

In Gillett on Crim. Law, 2nd ed., sec. 52, the rule of interpretation of the statute of limitations is stated thus:

> "Like all other criminal statutes these acts are to

be construed strictly against the defendants and liberally in their favor."

Chief Justice Maxwell in his work on Criminal Procedure (p. 1) says:

> "In criminal cases, where the bar [of the statute of limitations] is complete the offense is blotted out, and cannot again be called into existence at the option of the state."

See also Judge Philips' dissenting opinion in *Ware* v. *United States*, 154 Fed. 577, 593.

Few of the opinions of Mr. Justice Story have been more often quoted with approval at home and abroad than his opinion in *Bell* v. *Morrison*, 1 Peters 351, 360, where, discussing the doctrine of limitation in civil cases, he said:

> "It has often been matter of regret, in modern times, that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in an unfavorable light, as an unjust and discreditable defence, it had received such support, as would have made it, what it was intended to be, emphatically, a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time, but to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses."

If this be a wise and sound view in civil cases, how much more emphatically should it be the rule in criminal cases?

The views expressed in the courts and text writers are singularly applicable to the case at bar, and seem to point out the justice of favoring the defense by permit-

ting it to be raised preliminarily by special plea in bar.

Nearly six years had elapsed between the loan of $1,250,000 to Segal in December, 1903, and the finding of the indictment on July 1st, 1909. In the meantime, the alleged offense had been investigated by the Department of Justice of the United States, and it had failed to take proceedings. Indeed, the records of Congress show that the Attorney General of the United States was of opinion that there had been no violation of the Sherman Act in view of the authoritative interpretation of this court in the case of *United States* v. *E. C. Knight Company*, 156 U. S. 1. The matter had been reported to Congress and it had apparently acquiesced in this view. (See Sen. Doc. No. 687, Sixtieth Cong. second sess.; *N. Y. Indians* v. *United States*, 170 U. S. 1, 32; *Knight* v. *United States Land Assn.*, 142 U. S. 161.) Civil litigation had been instituted under section 7 of the act and damages in the fabulous amount of $30,000,000 were claimed (160 Fed. 144; 166 *ibid.* 254). Every temptation to distortion had arisen by reason of the pecuniary interest or cupidity of witnesses.

There cannot be the slightest doubt that in December, 1903, the bar of the United States regarded the *Knight* case as authoritatively settling the point that the acquisition and control by one manufacturing company of a competing manufactory was not within the scope of the prohibitions of the Sherman Act. In December, 1903, the *Knight* case must have seemed particularly in point, for it had involved an attempt by the same American Company to obtain control of four Philadelphia refineries,

which had theretofore been competitors, and the court had held that such a transaction was not an offense under the Sherman Act. The learned judge before whom the civil suit was tried held that the *Knight* case was controlling (160 Fed. 144); and it was not until the decision of the Circuit Court of Appeals in December, 1908, that it was held that the allegations of the complaint took the case out of that ruling. 166 Fed. 254. It may be true that the *Knight* case has since been modified, and it may be that it will be overruled; but surely counsel and parties were justified in December, 1903, in acting under its authority. An act which, according to authoritative decisions, was not criminal when done, ought not to be rendered criminal years afterwards by reason of a change of decision. *State* v. *O'Neil*, 126 N. W. 454. The policy of the statute of limitations tends to prevent any such injustice.

The first federal statute of limitations was contained in section 32 of the original Crimes Act of April 30th, 1790, 1 Stat. 119. The language then used was that—

> "No person . . . shall . . . be *prosecuted, tried or punished* for any offence, not capital . . . unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence."

This provision has remained until the present day, and is now section 1044 of the Revised Statutes.

The language used by the First Congress indicates, as plainly as words can disclose any definite thought, that it was the intention of Congress that an accused person should be neither *tried nor prosecuted* if three years had elapsed since the commission of the

alleged offense. The command of the statute is explicit, and the duty of prosecutors and courts cannot be doubtful. According to the plain language of an act of Congress, an accused is entitled, as of right, *not* to be put to the injury and expense and jeopardy of being *prosecuted* or *tried* on the merits unless the offense has been committed within the three years. This humane and beneficent purpose of Congress would in many cases be wholly defeated if the rule were that an accused person was in every case to be prosecuted and tried on the general issue, notwithstanding the bar of the limitation might be perfectly clear and indisputable.

Can any one doubt that, if the framers of the Crimes Act of 1790 had been asked how a person could avail of the protection and intended amnesty of the statute so as not to be *prosecuted* or *tried* for offenses to which the limitation was to apply, they would have answered that a special plea in bar would prevent further prosecution or any trial on the general issue. If they had been told that the govenment would urge and the courts might hold that the protection of the limitation could not be availed of in any case except on a trial of the general issue, would they not readily have perceived the inappropriateness and futility of the language they were using, commanding that no person should be prosecuted or tried? They surely did not intend to leave it to the discretion of prosecuting officers whether or not to prosecute or try the accused.

The first case that came before this court under section 32 of the act of April 30, 1790 was in 1805 (*Adams* v. *Woods*, 2 Cr. 336, 340). It was a *qui tam* action on behalf

of the United States and an informer. The defense of the statute of limitations was set up by special plea in bar, and the case was disposed of on demurrer to that plea. Chief Justice Marshall, speaking for the court, among other things, said:

> "But if the words of the act be examined, they will be found to apply not to any particular mode of proceeding, but generally to any prosecution, trial, or punishment for the offence. . . . But it is declared, that 'no person shall be prosecuted, tried, or punished'; words which show an intention, not merely to limit any particular form of action, but to limit any prosecution whatever."

It may fairly be said that if an accused cannot set up the statute of limitations by plea in bar, but must await prosecution and trial on the merits, the words of the statute will be deprived of much of their significance and effect and the character of the provision essentially changed. The statute would then be made to read as if the words *prosecuted* and *tried* were totally useless; and the result of the construction insisted upon by the government would be, in Chief Justice Marshall's language, *supra*, at p. 341, "to overrule express words, and to give the statute almost the same construction which it would receive if one distinct member of the sentence was expunged from it."

In the recent case of *Heike* v. *United States*, 217 U. S. 423, 429, which arose under a plea in bar setting up the defense of immunity, the court distinctly said that the defendant had "a right to raise an issue of law upon the indictment by demurrer, to plead in bar, or to plead the general issue." The only question involved was one of appellate procedure after a defendant's plea in bar had been overruled and he had asked leave and elected to

enter a plea of not guilty, which remained untried. There was no final judgment to review, and this court consequently had no jurisdiction.

The objections of the government to the form of the pleas and other questions of practice will be considered *infra*, pp. 100–107. It may be of aid first to analyze the contentions of the government on the merits and then to determine the nature of the crime of conspiracy.

II.

The contentions of the United States analyzed.

Sections 1 and 2 of the Sherman Act define three distinct crimes, namely, conspiracy, attempt to commit a crime, and a substantive crime. Under section 1 making any contract or engaging in any combination or conspiracy in restraint of trade is made a misdemeanor; and under section 2 monopolizing, attempting to monopolize, or conspiring to monopolize is likewise made a misdemeanor. The acts essential to constitute and the proof necessary to establish the actual commission of these several crimes are different, as are likewise the rules of law which govern their consideration. In conspiracy, the act of agreeing or conspiring is the offense; in attempting to commit a crime, the act must be more than mere agreement and preparation and involve a certain nearness to the contemplated result, and in substantive crime the result must have been accomplished. The averments of the indictment now before the court present only a case of conspiracy, for none of its

allegations can, by any latitude of construction, be held to duly charge the commission of the offense either of attempting to monopolize or monopolizing at any time after July 1, 1906.

It will be shown, in the following point (p. 45) that the gist or gravamen of the crime of conspiracy consists of the act of agreeing or conspiring, and not of the overt acts done to effect its object, and that the offense is essentially non-continuous. Before discussing these questions and the leading cases at unavoidable length, it may be of aid at once to appreciate the theories of the prosecution in the case at bar.

The principal contention of the government on the merits seems to be that the offense of conspiracy is necessarily continuous, that no act by the accused or by anybody else within three years is necessary to make the antecedent conspiracy an indictable offense, and hence that "it is altogether immaterial whether or not any overt act was done by any conspirator within three years before the indictment was found" (brief U. S. pp. 32, 38). The court is asked to hold, if we do not misapprehend the argument on the part of the United States, that the criminal offense of conspiracy may be deemed or presumed to have been *committed* within the three years' limitation without proof of a single act of any conspirator, simply because the antecedent conspiracy contemplated indefinite future acts (brief U. S. p. 40). As every form of conspiracy with which the law deals involves future acts and future effects or consequences, the result would be that the federal criminal law of conspiracy would not be punishing present acts, but intentions evidenced

only by acts long since barred by the statute, and that the statutory limitation would be abrogated in almost all conspiracy cases. Thus, according to the contention of the government, any party to a conspiracy might be indicted and punished criminally ten, twenty, or even fifty years after he had committed the act of conspiring, although in the meantime he might not have done a single act in pursuance of the conspiracy or to effect its object. Indeed, it was contended by the government in the court below that the only way in which the defendants could avail of the three years' limitation would be by showing affirmatively the abandonment of such conspiracy, and such contention is practically now repeated (brief U. S. pp. 40–42). In its final analysis, the theory of the government is that all that the prosecution would have to prove on the trial of this indictment would be the original engaging in a conspiracy in restraint of trade or conspiring to monopolize in December, 1903, without showing a single act within the three years of the limitation, and that the burden of proof would then be on the defendants to show that the original conspiracy had been actually abandoned or terminated and not continued into the period of the limitation.

An examination of the authorities cited below will show that in no case has it ever been held or even suggested that a man could be convicted of the crime of conspiracy without proof of some act done, whether by himself or a fellow-conspirator, within the period of limitation. The reasoning of the cases may differ, but all agree in holding or recognizing that some *act* or *deed* must be done within the time limited by statute. Even in the case of essentially con-

tinuous crimes, such as cohabitation or maintaining a nuisance, it is unreasonable to assume, what no court has ever intimated, that an accused, pleading the statute of limitations, could be convicted without proof of the actual continuance of the forbidden state within the period of the limitation, and this, of course, could only be shown by specific acts.

The defendants submit that the true test—the criterion of criminality—in conspiracy cases, as in most other criminal cases, must be found in criminal acts presently done and not in past intentions, and that the law deals only with the present acts and conduct of men and not with their thoughts or intents evidenced by past acts; in a word, that the law seeks external standards. The rule of the Roman law is the rule of our system. *Cogitationis pœnam nemo patitur.* Holmes' Common Law, p. 65; Bishop's New Crim. Law, vol. 1, sec. 204; Wharton's Crim. Law, 10th ed., vol. 1, sec. 174. It is alike the general rule of criminal jurisprudence and the dictate of natural justice, that to constitute guilt there must be a wrongful act however criminal the intention, that an unacted intent, past or present, is never a ground of criminal liability, and that the *will* and the *deed* must go together. Both the act and the criminal intention must concur, and both must be charged in an indictment and found by a jury to justify a conviction for committing a crime. Lord Kenyon in *Fowler* v. *Padget*, 7 T. R. 509, 514.

It is not, however, the contention of the defendants that after the lapse of three years from the original act of conspiring, conspirators become immune from punish-

ment for anything that they may do in pursuance of the original criminal purpose, or to effect its object. On the contrary, whenever it is made to appear that two or more persons, animated by a corrupt intent, have consciously participated in any act in furtherance of that intent, there is established the basis of fact from which a jury may infer that then and there those persons have agreed to further that corrupt purpose, and hence that then and there they have conspired and committed anew the crime of conspiracy. For this they are none the less indictable and punishable because at some prior time one or more of them committed a like offense by agreeing, either with the same persons or with some other persons, to further the same corrupt end. Those who conspire anew, even though it be for the same object for which they have previously conspired, are no more immune from punishment for the renewal of the conspiracy than are those who attempt to commit a crime immune by reason of the fact that at some prior time they attempted to commit the same crime by the same means, or than are those who attempt to perform an agreement rendered illegal by a statute enacted after the agreement was made.

There is no reason in the nature of things why the crime of conspiracy should be treated as essentially different from any other unlawful agreement. Both consist in the act of agreeing in violation of law. No one would seriously urge that the offense of making an agreement in restraint of trade would not be barred at the expiration of three years from the time it was made, no matter how long a period of performance it might contemplate. The crime

would consist in the making of the agreement and not in the acts done to perform it. But, of course, such an unlawful agreement could be renewed and an indictment lie for such renewal or making anew by proof of acts of performance. The law would still aim at the act of agreeing renewed every time the parties to the antecedent agreement consciously participated in acts tending to perform it. Thus, as in the *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, the agreement might be legal when made and become illegal by a subsequent statute. The original making could not be punished, but any subsequent concurrence in an act of performance could be treated as a renewal of the agreement and a violation of the statute. In that case, the offense sought to be punished would not be the antecedent agreement, but the renewal or making anew of the agreement, to be established by proof of present acts.

It is sometimes said that the performance of an overt act in pursuance of a conspiracy and tending to effect its object will *toll* the statute of limitations, and that an indictment which avers the commission of the offense of conspiracy prior to the period of limitation and overt acts within the period tending or intended to effect the object of the original conspiracy tolls the statute. This method of reasoning, however, is wholly unsound.

There is no such theory or doctrine in the criminal law as the tolling of a statute limiting prosecutions for crime except as expressly provided for in such statute. One may renew or repeat the crime, but no act short of the commission of the crime can start the statute running anew. It is shown below to be the settled principle of law that overt

acts form no part and constitute no element of the crime of conspiracy. If this be so, the doing of such acts cannot toll the limitation as to past criminal acts, although they may be evidence of the renewal of the crime. Under such a criminal statute as section 1044 of the Revised Statutes, the only act or circumstance that can toll the statute is the absence of the accused as a fugitive from justice (sec. 1045), and the limitation is not even then, strictly speaking, tolled, but the statute does not apply to any such fugitive, and he cannot, therefore, avail of it.

All through the argument of the government—and necessary to uphold it—is the assertion in one form or another that the question is as to the continued existence of the conspiracy, and that this is to be determined not by any present criminal act on the part of the accused, but solely by the antecedent intention or antecedent mutual understanding or the object of the original conspiracy; in other words, the contention is that if the original conspiracy was indefinite as to time, or if the conspirators contemplated a continuing effect or object, then they would remain liable to criminal prosecution indefinitely unless they could show an actual abandonment of their intent (brief U. S. pp. 40–42). Persons would then be punishable, not because they had done any criminal act or had actually committed any criminal offense within the three years, but because their antecedent intention contemplated future acts or consequences or effects. Under this theory, men would be liable criminally for past intentions, or as long as the consequences or effect of the antecedent acts continued to endure. It is submitted that no such doctrine exists in our system of criminal jurispru-

dence. The government fails to cite a single authority to sustain this extraordinary proposition, and we believe it is correct to say that there is no case anywhere which supports this contention of the government. On the contrary, every case where this question has been considered proceeds upon the assumption that, of course, a criminal act must be shown to have been done within the period of the limitation. See particularly *United States* v. *Owen*, 32 Fed. 534; *United States* v. *McCord*, 72 Fed. 159; *United States* v. *Greene*, 100 Fed. 941; *United States* v. *Greene*, 115 Fed. 343; *United States* v. *Greene*, 146 Fed. 803, affirmed in 154 Fed. 401; *Ex parte Black*, 147 Fed. 832; *United States* v. *Black*, 160 Fed. 431; *United States* v. *Bradford*, 148 Fed. 413, affirmed in 152 Fed. 616; *Ware* v. *United States*, 154 Fed. 577, certiorari denied in 207 U. S. 588; *United States* v. *Biggs*, 157 Fed. 264, affirmed in 211 U. S. 507; *United States* v. *Barber*, 157 Fed. 889; *Jones* v. *United States*, 162 Fed. 417, certiorari denied in 212 U. S. 576; *Jones* v. *United States*, 179 Fed. 584; *United States* v. *Breese*, 173 Fed. 402; *Lonabaugh* v. *United States*, 179 Fed. 476; *Lorenz* v. *United States*, 24 App. D. C. 337, certiorari denied in 196 U. S. 640; *Commonwealth* v. *Bartilson*, 85 Pa. St. 482; *Ochs* v. *People*, 25 Ill. App. 379, affirmed in 124 Ill. 399; *Fire Ins. Cos.* v. *State*, 75 Miss. 24; *State* v. *Langdon*, 159 Ind. 377; *State* v. *Mason*, 108 Ind. 48, 53.

It is then further argued by the government, as the necessary corollary of its fundamental proposition, that in conspiracy cases the abandonment of the conspiracy through inaction or affirmative acts, must be shown as a question of fact (brief, p. 42). This argument means

that the continuance of the commission of the crime is to be presumed in the absence of proof to the contrary, thus completely nullifying the presumption of innocence that the law throws around a defendant. *Coffin* v. *United States*, 156 U. S. 432. The next step in the argument seems to be that although abandonment may be inferred through inaction for three years, the statute of limitations should then only begin to run after such three years of inaction, that is to say, that the period of limitation of prosecutions for conspiracy would then be six years from the commission of any criminal act (p. 44).

Indeed, the government in its brief so far commits itself to the doctrine that no act whatever need be shown within the three years that it challenges (p. 45) the soundness of the decisions which hold that an overt act done to effect the object of an antecedent criminal conspiracy may under any circumstances be treated as evidence of a renewal of the offense. Thus, it is said that a so-called overt act cannot itself create a conspiracy, and however wrong in itself, would not support a charge of conspiracy unless following an actual conspiracy (p. 45). If it be meant by this statement that an overt act consciously done to effect the object of an antecedent conspiracy with the participation of one or more of the conspirators may not of itself prove the act of conspiring and thus constitute a renewal of the offense, it is entirely erroneous, as will be plain on the slightest consideration. For example, suppose that a conspiracy has been abandoned; may not the same conspiracy be renewed by the parties through conscious participation in an overt act done to effect the original object? If the conspirators in the case at bar had been

prosecuted for the original offense committed in 1903, could not the same conspiracy be renewed and such renewal be evidenced by acts done to effect the original object?

Let us suppose further that in the case at bar one count in the present indictment had charged the commission of the offense of conspiracy in December, 1903, and another and separate count had charged its renewal in 1907 or 1909, and that such renewal was evidenced by the conscious participation in overt acts to effect the object of the same antecedent original conspiracy. (See *Commonwealth* v. *Bartilson*, *infra*, p. 80.) Would it be argued seriously that this indictment only charged one continuous offense? Could not the defendants be acquitted on the first count because prosecution for the offense committed December 30, 1903, was barred by the statute of limitations, yet, nevertheless, be convicted on the second count, charging the offense in 1907 or 1909, if such count sufficiently charged and the proof showed the renewal of the conspiracy, or, in other words, the commission of the offense in 1907 or 1909? Again, let us suppose that the defendants, having accomplished their alleged purpose of closing the refinery for at least one year, had met in January, 1905, and abandoned their scheme by appropriate acts, and that three years had then elapsed. Of course, prosecution for the original offense would then have been plainly barred even under the government's theory. Suppose, however, that in 1907, the defendants had consciously participated in some acts tending to effect the same object as that of the original conspiracy; in other words, to restrain or monopolize interstate trade

by preventing the Pennsylvania Company from engaging in business. Would any one seriously argue that such overt acts would not be evidence of a renewal of the original conspiracy and sufficient to establish the commission of a new offense?

An examination of all the recent cases in the lower federal courts, involving as they do the consideration by many judges of the question of the limitation as applied to conspiracies, will show that in no instance has it been held or intimated that a conspiracy was a continuous or continuing offense in such a sense that it could continue to be committed or could be presumed to continue without any act done within the three years' limitation. It is true that the crime is sometimes spoken of as continuous, but this is generally coupled with the statement that it may be *renewed* by some affirmative act. In all these cases, except two (*United States* v. *Brace*, 149 Fed. 874; *United States* v. *Raley*, 173 Fed. 159), decided in the district courts, the indictments have charged and the evidence has established the commission of the offense upon a single day within the period of the limitation. All the other cases which have overruled the defense when examined will prove to be wholly consistent with the theory of renewability; and it will be seen that in no case is it held or suggested that the offense of conspiracy can be deemed or presumed to have been committed within the three years limitation without proof of some *act* done during that period.

The indictment in the case at bar was, therefore, fatally defective in not showing the actual commission of the crime of conspiracy within the period of the three years'

limitation prescribed by section 1044 of the Revised Statutes. The Grand Jury, in finding the indictment, must have proceeded upon the theory that if the conspiracy were proved as charged in December, 1903, it was not necessary to show the renewal of that conspiracy within the three years' limitation. If the present indictment stands, and the theory of the government be adopted, then all that will be necessary for conviction will be to prove the acts of the parties in December, 1903, *in engaging in the original conspiracy*, without the proof of a single act since that date, and without any proof that the parties consciously participated in or renewed the conspiracy at any date after July 1, 1906. The accused would then be punished, not for any criminal act done during the period of the limitation, but for acts done nearly six years before the finding of the indictment. Slight reflection must suffice to convince the court that there are grave differences between the proof which would justify an indictment and conviction upon the theory of a continuous crime commenced in 1903 and the proof which would be required to establish that the conspiracy had been renewed or that the accused had conspired anew within the three years. This distinction is one of vital substance in regulating the basis of indictments and trials for alleged conspiracies.

The alleged overt acts of 1907 and 1909 and their insufficiency to show the commission of the crime of conspiracy will be discussed under point IV, p. 84.

III.

CONSPIRACY IS A NON-CONTINUOUS CRIME, AND AN INDICTMENT WHICH CHARGES ITS COMMISSION ON A DATE BARRED BY THE STATUTE OF LIMITATIONS CHARGES AN OUTLAWED OFFENSE AND IS NOT SAVED BY AN ALLEGATION OF ITS CONTINUANCE TO A TIME WITHIN THE LIMITATION.

The indictment in the case at bar charges that the defendants were continuously engaged in the alleged conspiracies from December 30th, 1903, down to and including the date of its finding and presentation, and it is the government's contention that conspiracy is so far and so essentially a continuing offense that a person may be held to answer in conspiracy upon the allegation of its inception and completion at a time however remote coupled with an averment of continuance, and without allegation of any subsequent act of conspiring. It is submitted by the defendants that this contention of the government is unsound and that conspiracy is not continuing offense, but an offense which, like an attempt to commit a crime, and like many substantive crimes, is subject to renewal.

It is settled that, as to crimes which are not essentially continuous, the statute of limitations begins to run as against each renewal of the crime upon the commission of the act which constitutes the gist of the offense, and that where an indictment charges such an offense as continuing, that allegation will be disregarded as surplusage and the indictment construed to charge the crime only at the earliest date at which it avers the crime to have been completed. Thus, in *United States* v. *Irvine*, 98 U. S. 450, the indictment charged that on the 24th of Decem-

ber, 1870, the defendant wrongfully withheld the amount of a pension, "and continuously withheld it until the time of the finding of the indictment" in September, 1875. The court below held that the indictment charged a "continuous" crime, but this court reversed the ruling and held that a plea of the statute of limitations should have been sustained, Mr. Justice Miller speaking for the court as follows (p. 451):

> "It is not very easy to define for all purposes what constitutes under the statute a withholding of the pension. It cannot commence, of course, until the money is received by the party charged. Nor can it commence then, unless there is a duty of immediate payment to the pensioner. A reasonable time must certainly be allowed for this. What that is must depend in each case on its own circumstances. . . . In short, there must be such unreasonable delay, some refusal to pay on demand, or some such intent to keep the money wrongfully from the pensioner, as would constitute an unlawful withholding in the meaning of the law.
>
> "But whatever this may be which constitutes the criminal act of withholding, it is a thing which must be capable of proof to a jury, and which, when it once exists, renders the party liable to indictment.
>
> "There is in this but one offense. When it is committed, the party is guilty and is subject to criminal prosecution, and from that time, also, the Statute of Limitations applicable to the offense begins to run."
>
> "It is unreasonable to hold that twenty years after this he can be indicted for wrongfully withholding the money, and be put to prove his innocence after his receipt is lost, and when perhaps the pensioner is dead; but the fact of his receipt of the money is matter of record in the pension office
>
> "He pleads the statute of two years, a statute which was made for such a case as this; but the reply is, You received the money. You have continued to withhold it these twenty years; every year, every

month, every day, was a withholding, within the meaning of the statute.

"We do not so construe the act. Whenever the act or series of acts necessary to constitute a criminal withholding of the money have transpired, the crime is complete, and from that day the Statute of Limitations begins to run against the prosecution."

It is also the settled rule that where an indictment charges a crime which is not essentially continuous with a *continuando*, the *continuando* may be disregarded and the indictment treated as charging no more than the commission of the offense on the first day. Wharton's Crim. Pl. & Pr., 9th ed., sec. 125; Bishop's New Crim. Proc., vol. 1, sec. 388; Starkey's Crim. Pl., 1st Amer. Ed., pp. 60, 61; *King* v. *Dixon*, 10 Mod. 335, 337; *United States* v. *La Coste*, 2 Mason 129 (Story, J.); *People* v. *Adams*, 17 Wend. 475, 476 (Nelson, J.); *Wells* v. *Commonwealth*, 12 Gray 326; *State* v. *Nichols*, 58 N. H. 41; *Cook* v. *State*, 11 Ga. 53, 56; *State* v. *Briggs*, 68 Ia. 416; *State* v. *Thompson*, 31 Utah 228; *State* v. *Jasper*, 15 N. C. 323.

Wharton lays down the rule as follows (sec. 125):

"To aver that the defendant, on divers days, committed an offense, is bad; and so where two distinct days are averred; but it is sufficient to state that on a day specified, as well as on certain other days, he kept a gaming house, a tippling house or a common nuisance; the allegation, 'certain other days,' being rejected as surplusage. . . .

"The *continuando*, if unnecessary, may be rejected as surplusage."

Bishop's statement is as follows (sec. 388):

"Where the pleader, intending to employ the *continuando*, sets down a day certain and adds words

> insufficient as such, they will be rejected as surplusage, and the indictment sustained as charging the offense on the single day. Thus, the keeping of a common gaming-house may be, and be alleged as, committed continuously on more days than one; then, if the indictment charges it as done on a day certain, and adds, what is inadequate as a *continuando*, . . . it will be good for the day particularized, though more days might have been laid."

In the recent case of *State* v. *Thompson*, 31 Utah 228, 231, 232, the information, which alleged the commission of the crime of adultery "on the 13th day of February, 1905, and on divers other days and thence continually between the said 13th day of February, 1905, until the 1st day of August, 1905," was challenged for duplicity. The court held that this objection was not well taken, saying:

> "The allegation that the offense was committed on a certain day and thence continually between certain days, charges but one offense, because the day of another offense committed is not sufficiently specified. Each act of adultery constitutes a separate offense. Adultery is not a continuous offense. A *continuando* is not necessary unless for an essentially continuous offense. When an information sufficiently charges an offense not essentially continuous, committed on a specified day and year with an unnecessary *continuando*, the *continuando* does not injure the information, but may be rejected as surplusage."

In *United States* v. *La Coste*, 2 Mason 129, 140, the indictment charged the crime to have been committed "on the 3rd day of January, now last passed, and on divers days and times before and since the last-mentioned day, and after the said 20th day of April, 1818" (p. 139). The Circuit Court, by Mr. Justice Story, held that this did not vitiate the indictment, saying:

> "As to the other objection, that the offense is

> stated to have been committed on divers days and times, it is sufficient to say, that as the offense is alleged to have been committed also on a day certain, if it be but a single offense, the words, 'on divers days and times' may be rejected as insensible and surplusage: if the offense might have been committed on divers days and times, the allegation in this respect is too uncertain to warrant a judgment for such times; but this does not prevent a judgment for one offense which is stated to be committed on a day certain. Either way, then, the objection is not fatal. Hawkins puts an analogous case; if an indictment charged a man with having done a nuisance such a day and year, &c. and *on divers other days*, it is void only as to the facts on those days, which are uncertainly alleged, and effectual for the nuisance on the day specified. So in King *v.* Dixon the indictment charged, that they on such a day, and on divers other days and times, &c. as well before as after, kept a common gambling table. On demurrer, the Court held, that the time was uncertain as to all but one day, and that judgment could only be given for a single penalty."

In *People* v. *Adams*, 17 Wend. 475, it was charged as to the defendant that on the 1st day of June, 1836, and on divers other days and times between that day and the day of the finding of the indictment, to wit, the 12th of September, 1836, he sold liquors without a license. The sufficiency of the allegation of time having been challenged, the court, by Nelson, C. J., held as follows (p. 476):

> "As to time, the count, I think, is sufficiently certain, a day being mentioned; the *continuando* may be rejected as surplusage. Sergeant Hawkins says, (b. 2, ch. 25, Sec. 82), that if an indictment charged a man with having done such a nuisance on such a day and year, &c. and *on divers other days*, it is void only as to the facts on those days which are uncertainly alleged, and effectual for the nuisance on the day specified."

In *Wells* v. *The Commonwealth*, 12 Gray 326, 328, the indictment charged the keeping of a house of ill-fame on the 1st day of December in the year 1857 and on divers other days and times between said 1st day of December and the 1st day of June, 1858. The court laid down the rule as follows:

> "It is an indictment for a nuisance, which is an offense that may have continuance, and may therefore be laid with a *continuando*, and the general rule is well established, that when an offense, which may have continuance, is alleged to have been committed on a day certain and on divers other days which are uncertainly alleged, the indictment is effectual for the act alleged on the day certain, and void only as to the act alleged on the other days."

Thus, it is clear that if a non-continuing offense be pleaded with a *continuando*, the *continuando* will be rejected, and the indictment treated as alleging in legal effect nothing more than the commission of the offense upon the first day laid; and hence if conspiracy is a non-continuing offense, it is clear that the indictment now before the court charges only an offense committed on the 30th of December, 1903.

The most persuasive substantiation of the proposition that conspiracy is not a continuing offense is to be found in the fact that throughout the history of the criminal law, until the most recent times, no case has been found in which an indictment charging conspiracy as a continuing offense has been sustained, and but few have been found in which it was attempted so to be charged, and that the one or two exceptions to that rule have been decisions of courts at *nisi prius* which are

readily to be explained by a confusion of ideas between the requirements of pleading and proof.

An analysis of the nature of the crime of conspiracy will readily show the soundness of the proposition that the offense is non-continuing since the essential element of the offense is the act of confederating or plotting, which is inherently a non-continuing act, and not acts which may be done in pursuance of the conspiracy or to effect its object. And that this is especially clear under the Sherman Act. In this respect, the statute differs from conspiracies under section 5440 of the Revised Statutes, which requires an overt act to complete the offense. There can be no doubt that at common law and under the Sherman Act, the offense of conspiracy is complete, and hence the crime is actually *committed*, when the design or intent is followed by the act of agreeing or confederating, and that it is the bare act of agreeing alone that constitutes the crime. In other words, when two or more agree to carry an unlawful design into effect, the very agreement or plot is an act in itself. This is conceded by the government, for it says in its brief at p. 51:

> "The Sherman Act makes a conspiracy in restraint of commerce or to monoplize commerce an offense without the occurrence of a single overt act."

In Archbold's Criminal Pleading, 22d ed., p. 1209, the author says:

> "Conspiracy is an indictable misdemeanor, consisting in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect the very plot is an act itself, and the act of each of the parties, promise against promise, *actus*

> *contra actum*, capable of being enforced if lawful, is punishable if for a criminal object or the use of criminal means."

See also Bishop's New Crim. Law, vol. II, secs. 171, 172.

And all authorities concur in this view.

In *United States* v. *Hirsch*, 100 U. S. 33, 34, the court said, of a conspiracy charged under section 5440 of the Revised Statutes:

> "The *gravamen* of the offense here is the conspiracy. For this there must be more than one person engaged. Although by the statute something more than the common-law definition of a conspiracy is necessary to complete the offense, to wit, some act done to effect the object of the conspiracy, it remains true that *the combination of minds in an unlawful purpose is the foundation of the offence, and that a party who did not join in the previous conspiracy cannot, under this section, be convicted on the overt act.*"

In *United States* v. *Britton*, 108 U. S. 199, 204, also arising under section 5440 of the Revised Statutes, the court said:

> "The offence charged in the counts of this indictment is a conspiracy. This offence does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiæ*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that in an indictment for conspiracy under section 5440, the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy. *Reg.* v. *King*, 7 Q. B. 782; *Commonwealth* v. *Shedd*, 7 Cush. 514."

And these definitions of the crime have been uniformly

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followed and approved by the court. *Pettibone* v. *United States*, 148 U. S. 197, 202; *Dealy* v. *United States*, 152 U. S. 539, 547; *Bannon* v. *United States*, 156 U. S. 464, 468. In *Williamson* v. *United States*, 207 U. S. 425, 447, Mr. Justice White said:

> "The conspiracy is the offense which the statute defines without reference to whether the crime which the conspirators have conspired to commit is consummated."

In *United States* v. *Donau*, 11 Blatchf. 168, 169, Judge Benedict said:

> "The offense of conspiracy is committed when, to the intention to conspire, is added the actual agreement; and this intent to conspire, coupled with the *act of conspiring*, completes the offense intended to be created by the statute, notwithstanding the requirement that the prosecution show, by some act of some one of the conspirators, that the agreement went into actual operation."

In *State* v. *Buchanan*, 5 H. & J. (Md.) 317, 355, it is declared that

> "There is nothing in the objection that to punish a conspiracy where the end is not accomplished, would be to punish a mere unexecuted intention. It is not the bare intention that the law punishes, but the *act of conspiring*, which is made a substantive offense, by the nature of the object intended to be effected."

And in *People* v. *Mather*, 4 Wend. 229, 264, Marcy, J., said, in speaking of conspiracy:

> "It is not a mental offense; it does not consist in intents and imaginations. It exists where there are no overt acts *other than the agreement.*"

As the House of Lord said in *O'Connell* v. *The Queen*, 11 C. & F. 155, 233:

> "It has accordingly been always held to be the

law, that the gist of the offense of conspiracy is the bare engagement and association to break the law, whether any act be done in pursuance thereof by the conspirators or not."

In *Mulcahy* v. *Reg.*, L. R. 3 H. L. Cas. 306, 317, the court said:

"A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, *the very plot is an act in itself*."

In *Commonwealth* v. *Judd*, 2 Mass. 329, 337, Chief Justice Parsons used the following language:

"The Court are satisfied that the gist of a conspiracy is the unlawful confederacy to do an unlawful act, or even a lawful act for unlawful purposes; that the offence is complete when the confederacy is made, and any act done in pursuance of it is no constituent part of the offence, but merely an aggravation of it."

In *People v. Flack*, 125 N. Y. 324, 332, it is said:

"The gist of the crime of conspiracy consists in a corrupt agreement between two or more individuals to do an unlawful act, unlawful either as a means or as an end. (Bishop's Cr. Law, § 171, *et seq.* and cases cited.) The agreement may be established by direct proof or by inference, as a deduction from conduct which discloses a common design on the part of persons charged to act together for the accomplishment of the unlawful purpose. At common law the crime of conspiracy was complete when a corrupt agreement was made, although not followed by any overt act and no step had been taken in furtherance of the object of conspiracy."

The rule that the offense consists solely of the act of conspiring and not of the overt acts done in pursuance of

the conspiracy does not, of course, exclude proof of overt acts. They are admissible and ordinarily essential as evidence from which the fact of antecedent agreement may be inferred and the nature or character of the conspiracy determined, or they may with other proof tend to establish the renewal or repetition of the offense. They would, however, be immaterial if the fact of conspiring were otherwise conclusively proved or were admitted as by demurrer.

These authoritative pronouncements as to the nature of the crime of conspiracy and as to the act that constitutes the essential element of the offense are incompatible with the theory that it is a continuous crime. This will become manifest upon a consideration of the criterion whereby continuing and non-continuing offenses are distinguished.

A continuing offense is one in which the act or acts constituting the essential element of the offense must necessarily continue in an uninterrupted course of performance throughout a period of time more or less protracted. It necessarily contemplates duration of time as an essential and indispensable element of the definition of the crime. And it consists generally of a state or condition maintained or continued by acts. Such an offense is subject to prosecution at any time during the maintenance of the state or condition, but only one prosecution will lie for the entire period, for there has been but one offense. A non-continuing crime is one in which the act that constitutes the offense is performed *uno ictu;* and a crime of this character, even when described by statute in terms that indicate continuance, must be prosecuted as of the day when that act was performed and the crime thus

completed. *United States* v. *Irvine*, 98 U. S. 450, 452. But many crimes, which are non-continuous, are by their nature subject to renewal, and in such case, each renewal of the act constituting the gravamen of the offense constitutes a new crime. Thus, successive burglaries might be committed by the same person upon the same premises; successive briberies of the same official to commit the same acts of malfeasance or misfeasance; or successive attempts by the same person in the same manner to commit almost any offense.

The true criterion of continuity is to be found in the nature of the act or condition which constitutes the essence of the offense, as distinguished from the purpose that animates it, or the results, consequences or effects that flow from it. This is illustrated by the decision of this court in *Armour Packing Co.* v. *United States*, 209 U. S. 56, read in connection with the decision of the Circuit Court of Appeals, Sixth Circuit, in *Davis* v. *United States*, 104 Fed. 136, which is therein distinguished. The question in both cases was as to the *locus* of the alleged offense for the purpose of determining the district in which the accused could be tried under section 2 of Article III of the Constitution and under the Sixth Amendment. In the *Armour* case, the indictment charged an offense under the Elkins Act of February 19, 1903, 32 Stat. 847, in accepting or receiving a rebate whereby property was transported in interstate commerce at a lower rate than that named in the tariffs published and filed by the carrier. In the *Davis* case the prosecution was under the act of March 2, 1889, 25 Stat. 858, for false billing of merchandise to be transported in interstate commerce.

In each instance, the merchandise had been actually transported; in each instance, it was obviously the intention of those who procured it to be transported that it should reach its destination, and in each instance their intention manifestly persisted or was continuous throughout the whole period of the transportation. Each prosecution, therefore, presented a case in which the result of the criminal act endured at least throughout the period of transportation. In the *Armour* case, it was held that the offense which was being prosecuted was a continuing offense, and that it might be prosecuted in any district through which the transportation took place as of the time of the transportation in that district, because the statute under which the prosecution was instituted made the actual transportation of the merchandise one of the essential elements of the crime, and, therefore, so long as the transportation was in progress one of the acts constituting the crime was being committed. In the *Davis* case, however, it was held that the actual transportation did not constitute one of the essential elements of the crime, and hence that the crime was not continued in course of commission throughout the period of transportation and in the districts where the transportation took place, and that a prosecution would not lie in a district where that was the only act done. Mr. Justice Day delivered the opinion of the Circuit Court of Appeals of the Sixth Circuit in the *Davis* case, and subsequently delivered the opinion of this court in the *Armour* case.

The soundness of the view that it is the nature of the act constituting the offense that determines its continuous or non-continuous nature will be rendered more

apparent by a consideration of the crimes that have been held to be continuous as distinguished from those held to be non-continuous, or merely subject to renewal. Thus, erecting a nuisance is a non-continuous offense, but maintaining it is a continuing one. *State* v. *Poyner*, 134 N. C. 609. It cannot be doubted that if a nuisance were to be erected and then destroyed, and next day restored, each restoration would constitute a separate offense; while if it were maintained without interval, there would only be a single offense throughout the entire period of maintenance. Wharton's Crim. Law, 10th ed., vol. I, sec. 27. Again, where gambling constitutes an offense, every waging contract is a separate crime, but if the offense be keeping a gambling house, the crime is single for the entire period of its continuance up to the time of the finding of an indictment. *State* v. *Prescott*, 33 N. H. 212, 214. The same distinction is applied to the crime of adultery (*State* v. *Thompson*, 31 Utah 228, 231; *State* v. *Briggs*, 68 Ia. 416, 419; *Matter of Neilsen*, 131 U. S. 176), as distinguished from unlawful cohabitation. *In re Snow*, 120 U. S. 274. The former consists of a single act, and the latter of the maintaining of a status. So, of somewhat similar crimes, such as bigamy, which is a crime committed *uno ictu*, since the act which constitutes the criminal offense is the act of marrying, and neither the continuance of the marital relation, nor the consummation of the marriage is essential to it. *Gise* v. *Commonwealth*, 31 P. F. Smith (Pa.) 428. So, of rape or incest (*Cook* v. *State*, 11 Ga. 53, 56), where the repetition of the acts with the same individual constitute separate offenses. *People* v. *Flaherty*, 162 N. Y. 532, 538.

If a crime could be rendered continuing without continuity of action, solely through the presumed persistence of intent or the persistence of the result, and if an offense whereof every essential act had been committed prior to the statutory period were subject to prosecution after that period, there would be presented an instance where one who had secured amnesty by lapse of time for every criminal act which he had ever committed was nevertheless subject to prosecution on the basis of his intent alone, evidenced and to be established wholly by precedent acts.

These principles are not affected in their general application by the fact that the act constituting the crime is the making of a contract which contemplates future acts, for it is unquestioned that the gravamen of the offense in bigamy is the making of the contract of marriage, and that in bribery it is the making of the agreement to affect official action. In bribery, the offense consists in the corrupt agreement to procure an act of official malfeasance, and neither the payment of the consideration by the one party nor the performance of the corrupt compact by the other is essential to or an integral part of the offense. The intent which animates the act of agreeing, in bribery, ordinarily persists up to and including the time when the corrupt compact is to be performed, and oftentimes it results in the performance of that compact. But it has never been contended that in bribery the statute of limitations ran from any date other than that at which the corrupt bargain was struck, or that it could be prosecuted as an offense which continued from the time the bargain was made until the time for the performance of the corrupt act had arrived. On the other

hand, it cannot be doubted that each new agreement whereby it was sought to procure the official to do a corrupt act would constitute a new offense and that this would be rendered no less true by reason of the fact that there had been prior agreements to the same end between the same parties. So, in bigamy, the status created by the corrupt contract of marriage continues, and ordinarily the intent that animates the offense is continuous, but the crime is concededly non-continuous. In each instance, both the intent and the results endure, but that does not change the essential nature of the crime and render it continuous.

The application of this principle to conspiracy is made especially emphatic by the unbroken line of authorities which establish in the most positive manner that the results which flow from conspiracy, *i. e.*, the acts done in pursuance of it, form no part of the offense; for, as has been already pointed out, it is not only settled that the acts done in furtherance of the crime are no part of the crime itself, and that their performance is immaterial to the criminality under the conspiracy, but a compact which does not contain within itself all the elements of wrong will not be rendered indictable by the criminality of acts done in furtherance of it. *United States* v. *Britton*, 108 U. S. 199, 205; *McKenna* v. *United States*, 127 Fed. 88, 90; *Salla* v. *United States*, 104 Fed. 544, 545; *Conrad* v. *United States*, 127 Fed. 798; 801. Indeed, the acts done pursuant to a conspiracy, and in furtherance of it, are so far from being a part of the offense that if they be criminal they constitute separate crimes, and a conviction or acquittal on either the conspiracy or the separate crime is no bar to a prosecution

for the other offense. *Berkowitz* v. *United States*, 93 Fed. 452, 457; *Davis* v. *People*, 22 Colo. 1, 3; *State* v. *Sias*, 17 N. H. 558; *Bailey* v. *State*, 42 Tex. Criminal Rep. 289, 291; *Whitford* v. *State*, 24 Tex. Court of App. Rep. 489, 493; *Wallace* v. *State*, 41 Fla. 547, 557; *Wilcox* v. *United States*, 103 S. W. 774, 776.

Manifestly, these principles are incompatible with the theory that conspiracy is rendered continuing through its results; for it is one of the attributes of a continuing crime that all the acts which enter into it form but a single offense, and that that offense embraces all acts which enter into the commission of the crime throughout its entire period of performance. Thus, in *Matter of Neilsen*, 131 U. S. 176, 186, it was held by this court that a conviction for the offense of unlawful cohabitation during a given period was a bar to a prosecution for an act of adultery committed with one of the parties to the cohabitation during the same period, though adultery constituted a separate crime. And this decision was based upon the ground that cohabitation was a continuous offense and that as such it necessarily embraced within itself all acts performed in the course of its criminality. *Converso*, therefore, an offense which does not embrace within itself the acts which result from it, cannot be held to be rendered continuous by reason of the performance of those acts.

These principles are entirely in accord, however, with the theory that a conspiracy is a renewable offense, and that it is renewed whenever two or more persons animated by a corrupt intent consciously participate in any act in furtherance of that intent. And it follows from these principles that while those who enter upon a con-

spiracy may secure immunity for their criminal acts after a lapse of three years if they do nothing further within the three years, those who persist in their original purpose and seek by co-operative action to carry it into effect incur a liability each time they co-operate; in other words, each time they commit the offense of conspiring. The subsequent acts may be sufficient, in connection with what has preceded them, to establish a renewal of the conspiracy; and for these acts *those who are proved consciously to have participated in them* may be held for the renewal of the conspiracy. But it does not follow from these principles, nor is it consistent with them, that the mere performance of an act by some individual relating remotely to or connected with an agreement which he had previously entered into with others, of itself suffices to constitute a renewal of the conspiracy as to all. The evil at which the law of conspiracy is aimed is that which flows from concerted action, and conspiracy itself inevitably involves the idea of concerted action. A conspiracy which was committed or was established or was renewed by the unaided act of a *single individual* would be a contradiction in terms. Nor is it consistent with these principles that each overt act performed by any one or more persons in furtherance of the same object as that of a pre-existing conspiracy suffices to renew the conspiracy as to *all* who had originally participated in it. This would be abhorrent to the principle of natural justice which forbids that crime shall be imputed to an individual save upon the basis of acts to which he has contributed, and could be founded only upon the theory that, as to the individual who did

not participate in the performance of the act, the crime consisted in the persistence of his original intent.

This view of the nature of conspiracy is the only one which is consistent both with principles of justice and with the necessity of such effective enforcement of law as will tend to check and prevent the evil which the law of conspiracy is designed to remedy. Under the theory that conspiracy is a continuing offense, one who has entered into a conspiracy, it may be twenty years ago, is either presumed to be continuing in crime by reason of the terms of the criminal compact or of the intent which animated it, and is thus held to be committing a crime at a time when he is doing no criminal act whatever; or he is held to be guilty of a crime whose essence is concurrent activity or conscious participation at a time when he is guilty of no such activity or participation, and the crime is therefore, to be imputed to him solely by virtue of the activity or participation of some other person. Moreover, the policy of the criminal law is to deter and prevent crimes and mischief. It would necessarily result from the theory that conspiracy is a continuous crime, that one who had once embarked upon a conspiracy would have every incentive to continue in his criminal course and no incentive to desist or abstain therefrom; since by embarking upon the conspiracy he had subjected himself to the full penalty, and since by continuing in it he could subject himself to no greater liability. *Matter of Neilsen*, 131 U. S. 176; *In re Snow*, 120 U. S. 274. Surely, if such a conclusion were now to be announced as law, it would tend to minimize the effectiveness of the statutes against conspiracies, and would supply every inducement to the

continuance of attempts to effect the illegal purposes and no inducement to the abandonment of such purposes.

The theory that the crime of conspiracy is not continuing eliminates these absurdities, and substitutes a body of doctrine which produces results that are at once just and effective. Under that theory, he who engages in a conspiracy is held for the act of conspiring. If he ceases after the first act, he acquires amnesty after three years. No activities other than his own can prolong the duration of his individual guilt and criminal responsibility and no act but his own, i. e., his agreement, concert, or conscious participation, imposes responsibility upon him. If, on the other hand, he persists in the forbidden purpose and joins with others in furtherance thereof, he incurs a new responsibility for such new activity; and thus to each offender there is meted out a punishment commensurate with his own offending.

It is the failure to appreciate the soundness of these propositions that has wrought such confusion as is occasionally to be found in the literature of the subject. From a realization of the practical necessity that conspiracies should be subjected to punishment as long as the evil involved in them persisted, there has resulted a disposition to strain legal principles in order to find a basis for criminality other than the original act of agreeing; and it has not been appreciated that that necessity would be adequately met and a remedy precisely commensurate with the evil would be supplied by the indictability of each new act of agreeing. Consequently, there has arisen a tendency to take refuge in the theory that a conspiracy was rendered continuous by reason of the presumed per-

sistence of the intent—a concept which flies in the face of fundamental legal principles; or by reason of the continuing character of the activities which were designed to flow from the act—a concept which flies in the face of the fundamental principles of the law of conspiracy, that it is the conspiracy and not that which flows from it that constitutes the offense. In one aspect the mere intent would be punished; and in the other aspect, the overt act alone would be made the test of the crime of conspiracy.

All the well considered cases will be found to have been decided upon the theory that the offense is renewable and not continuing.

In *Ware* v. *United States*, 154 Fed. 577, (certiorari denied in 207 U. S. 588), decided by the Circuit Court of Appeals, Eighth Circuit, the indictment was for conspiracy to defraud the United States of the title and possession of lands by means of fraudulent entries under the Homestead Laws, and each count of the indictment charged a conspiracy formed *within three years* of the filing of the indictment, and an overt act thereunder. The offense was thus charged to have been actually committed within the limitation. The evidence showed that the conspiracy had been originally formed and that an overt act in pursuance thereof had been performed prior to the period of three years. By reason of this fact, it was claimed that the offense was barred by section 1044 of the Revised Statutes, the argument being that as the crime was completed when the conspiracy was first formed and the overt act done, it could not be revived so as to affect the bar of the

statute of limitations by any subsequent act on the part of the conspirators. The court held that this proposition was unsound, and that a conspiracy, like any other crime, could be renewed by the performance of all the acts essential to its commission within the period of the statute of limitations, no matter how long before that period the same acts had previously been done.

Sanborn, C. J., speaking for the court, said (pp. 579, 580):

> "After a careful reading and consideration of these and other authorities, our conclusions are that the true answer to this question is that the existence of the conspiracy and the *conscious participation* of the defendant therein with the three years are indispensable to the maintenance of such a prosecution; but that, if these facts are established by competent evidence, such a prosecution may be sustained. Proof of the formation by the defendant and others, more than three years before the indictment, of such a conspiracy as that charged in the indictment under which an overt act has been done prior to the three years, is insufficient to sustain the charge of a conspiracy within the three years. But in connection with evidence aliunde of the existence of the same conspiracy, and of the *defendant's conscious participation therein within the three years*, it is competent evidence for the consideration of the jury in determining the issue presented by the indictment. An overt act committed by one of the alleged conspirators within the three years pursuant to a conspiracy between him and the defendant, formed and followed by an overt act more than three years prior to the filing of the indictment without the defendant's consent or agreement within the three years to the continued existence and to the execution of the conspiracy, is incompetent to establish its existence and his participation therein within the three years. . . . .
>
> "The same rules of law and of evidence govern the trial and the decision of the issue whether or not

the defendant jointly with others consented or agreed within the three years to the existence of the conspiracy and the subsequent execution of its scheme which control the trial of the issue whether or not the conspiracy was originally formed, where that is the crucial question. *Evidence must be produced from which a jury may reasonably infer the joint assent of the minds of the defendants and of one or more other persons within the three years* to the existence and the prosecution of the unlawful enterprise. Until such evidence is produced, the acts and admissions of one of the alleged conspirators are not admissible against any of the others unless the court in its discretion permits their introduction out of their order. But where evidence has been produced from which the joint assent of the defendant and one or more other persons *within the three years* to the existence and execution of the conspiracy may reasonably be inferred by the jury, then any subsequent act or declaration of one of the parties in reference to the common object which forms a part of the *res gestæ*, may be given in evidence against one of the others who has consented to the enterprise. And the joint assent of the minds of a defendant and others *within the three years* to the existence and execution of the conspiracy may be found by the jury like any other ultimate fact as an inference from other facts proved. Drake *v.* Stewart, 22 C. C. A. 104, 107; 76 Fed. 140, 143."

Obviously, the theory which underlies this decision is that conspiracy is not a continuing crime and is not an offense which flows uninterruptedly from the original formation of the agreement until the object of the agreement is consummated; but that it is a crime which is committed only by the joint assent which is its essence, and accordingly that the act of conspiring must be established as of the date on which the conspiracy is laid in order to justify a prosecution as of that date. In other words, the *ratio decidendi* is that the renewal of the conspiracy

must be established within the limitation and that a prosecution will not lie upon mere proof of the old offense committed prior to the running of the statute. This case is a clear authority in support of the defendants' contention that conscious participation or joint assent must be alleged and proved within the three years.

Nearly all the other federal cases which deal with the statute of limitations in its application to conspiracy proceed upon the same theory, though some of the decisions, which are based in fact upon the theory that a new conspiracy had been formed, are accompanied by opinions in which the crime is spoken of interchangeably as continuous or renewable.

Thus, in *United States* v. *Jones*, 162 Fed. 417, decided by the Circuit Court of Appeals of the Ninth Circuit, the indictment charged a conspiracy *formed on the third day of September, 1902*, which was just within the three years' limitation, but there was evidence showing the original formation of the conspiracy in 1900 and overt acts both before and within the three year period. The contention of the defendants was that urged in the *Ware* case. The court approved of the doctrine of the *Ware* case, and in the course of its opinion said (p. 427):

> "It was a continuing conspiracy, and so long as conspirators continued in pursuance of it, and did not avail themselves of the *locus penitentiæ* that section 5440 of the Revised Statutes afforded them, *every overt act committed by any party to the conspiracy gave new effect to the conspiracy and constituted another crime.* Such we understand to be the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of Ware *v.* U. S. 154 Fed. 577."

Manifestly, there is here a contradiction in terms. If the conspiracy were one continuous crime, the "renewal" could not possibly constitute a new crime, for it is elementary that a continuing crime is a single offense no matter how long may be its duration. *In re Snow*, 120 U. S. 274; *Matter of Neilsen*, 131 U. S. 176. That the case was presented and decided upon the theory of renewal and not of continuance is made manifest from the indictment which charged, not a conspiracy formed prior to the statutory period and continued within it, but a conspiracy formed within the statutory period, that is, a new conspiracy.

In the subsequent case of *Jones* v. *United States*, 179 Fed. 584, 610, also decided by the Circuit Court of Appeals for the Ninth Circuit, the indictment charged the crime to have been committed within three years prior to the finding of the indictment, and the court simply followed the doctrine which it had laid down in *Jones* v. *United States*, 162 Fed. 417.

This view of the renewability of the crime of conspiracy was declared to be the law of the federal jurisdiction in *United States* v. *Biggs*, 157 Fed. 264. In this case, the indictment charged that the defendants

> "On the twenty-fifth day of August in the year eighteen hundred and ninety-nine, and at the several times of the committing of the several overt acts hereinafter in this indictment mentioned, and continuously at all times between the said twenty-fifth day of August in the year last aforesaid and the day of the presenting of this indictment, unlawfully did conspire, etc." (p. 264).

It further charged the commission of a number of overt acts some of which were within the period of three years. The court held that the indictment must either be regarded

as charging a conspiracy formed on the 25th day of August, 1899, and therefore a conspiracy barred by the statute of limitations; or as charging a number of separate conspiracies entered into from time to time and therefore multifarious. In this case an appeal was taken to this court by the government, under the act of 1907, but the court, having decided that the demurrer was rightly sustained upon another point, refused to pass upon the questions arising under the statute of limitations and declined to express any opinion with regard to them. 211 U. S. 507, 522.

In *United States* v. *Bradford*, 148 Fed. 413, affirmed on the opinion below, 152 Fed. 616, the formation of the conspiracy was laid as *within the statute of limitations*, and the same question that was involved in the two cases last discussed was considered by the court and decided in the same way. The opinion discloses the same interesting confusion between renewal and continuance and the same contradiction in terms as that in the *Jones* case. Thus the court says arguendo at one place (p. 417):

> "That immunity from prosecution for the conspiracy would result from the lapse of three years after the commission of the first overt act, although the conspiracy were thereafter *continued* or *repeatedly renewed*, and many other overt acts committed under it, . . . is an utterly irrational conclusion, which the law could never have contemplated;"

and thus shows that continuance and renewal were to it practically interchangeable terms. Then follows reasoning which shows that the court was dealing with conspiracy as a renewable offense (p. 418):

> "What difference, so far as regards the statute of limitations, is there in principle between the condition

> just stated and the proposition that there may be as many prosecutions as there are overt acts, *when the same conspiracy is renewed as each different overt act is committed?* The conspiracy C, plus overt act A, create a criminal condition, for which the government can prosecute under the terms of Rev. St. §5440, during three years from the date of overt act A. *The same conspiracy C, or any other conspiracy, plus overt act B, create another and a different criminal condition, for which the government can prosecute during three years from the date of overt act B. And so on.*"

The basis for this view is disclosed later on in the opinion by this statement (p. 419):

> "It is well and fully settled that the commission of an overt act is, per se, a renewal of the conspiracy."

In the case of *United States* v. *Greene*, 115 Fed. 343, 349, 350, affirmed 154 Fed. 401, the indictment charged the conspiracy as having been entered into in 1897, which was within the period of the statute of limitations. There were allegations of matters of inducement showing that the scheme had been formed prior to 1897 and had been in course of execution, but the only conspiracy actually *charged* was alleged as of the first of January 1897. The court on analysis of the indictment found that it was not duplicitous and that prosecution was not barred by the statute of limitations. Its view of the nature of the crime is indicated by the following:

> "Yet if, within the period of effective prosecution before the date of the indictment, *joint action* was taken by the alleged conspirators, or by two of them, in pursuance of the general scheme, *eo instanti* the tenacious grasp of the law seized upon the parties, and courts will proceed to lay bare from its inception every incident of the conspiracy."

The insistence upon the necessity of "joint action" within the period of limitation was certainly inconsistent with the idea of the continuance of the conspiracy and consistent only with the renewable theory. That the court was proceeding upon the renewable theory is made manifest by the charge to the jury in the same case, reported in 146 Fed. 803, 888, from which we quote as follows:

> "The several conspiracy counts in indictments Nos. 322 and 371 charge that the defendants on trial and the alleged co-conspirators confederated and agreed together on or about January 1, 1897, to defraud the government in the manner set out in the several counts of the said indictments. Some evidence has been submitted on the part of the United States tending to show that there was a new meeting of minds on or about January 1, 1897.... If the jury believe from the evidence that a corrupt scheme to defraud, such as is averred in the conspiracy counts of the indictments, had been in operation by and between the defendants for several years, and that there was a *new meeting of minds* between the said defendants to the indictments on or about January 1, 1897, looking to the fraudulent execution of the work under these 1896 contracts, they might infer that there was a *renewal* of the conspiracy on or about January 1, 1897."

In *Lorenz* v. *United States*, 24 App. D. C. 337, 387 (certiorari denied, 196 U. S. 640), the offense was charged as having been committed *on a date within the statute of limitations*, and the indictment charged the formation of the conspiracy within three years. The court charged the jury (p. 387):

> "The jury are instructed that, in order to warrant a verdict of conviction, it is not necessary for the government to show, or for the jury to find, that the several conspiracies charged in the indictment, or any

of them, were entered into upon the particular dates mentioned in the indictment. It is sufficient if it appear that the conspiracies alleged were entered into at any time within the period of three years before the filing of the indictment,—that is to say at any time within three years prior to the 22d day of June, in the year 1903. The fact, therefore, if you find it to be a fact, that the conspiracies charged in certain of the counts were not, or could not have been, entered into on the days on which they are charged, should not prevent your finding a verdict of guilty upon those counts if you find they were entered into at some other time or times within three years prior to the said twenty-second day of June, 1903.

"Undoubtedly, as argued, the conspiracy is the gist of the offense defined in Section 5440, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3676), though it is not indictable until some act shall have been done by one or more of the conspirators to effect the object of the corrupt agreement. The offense is then complete as to that act, and the statute at once begins to run; but it does not follow that all similar acts thereafter may be committed with impunity. Through the repetition of such acts—overt acts, as they are commonly called—the conspiracy is made a continuing offense. *By each subsequent act it is repeated and entered into anew.* People *v.* Mather, 4 Wend. 259; 21 Am. D. C. 122; Com. *v.* Bartilson, 85 Pa. 482, 489; Fire Insurance Cos. *v.* State, 75 Miss. 24, 35, 225 So. 99; Ochs *v.* People, 25 Ill. App. 379, 414, 124, Ill. 399, 426, 16 N. E. 662; United States *v.* Greene, 115 Fed. 343."

In *Arnold* v. *Weil*, 157 Fed. 429, 430, a removal proceeding, the indictment charged a conspiracy formed in Colorado. The proof before the commissioner established the original inception and "its renewal by overt acts" in Colorado. The court held that a removal should be ordered, saying:

"Surely it does not require any great stretch of

logical principle to say that the conspirators have *agreed again*, have *renewed* the conspiracy, or continued it, whenever and wherever one or more act for and with the approval of and under the direction of all."

In *Ex parte Black*, 147 Fed. 832, 838, 841, affirmed 160 Fed. 431, it was sought to remove defendants to Oregon under an indictment found April 3, 1906 (p. 833), which charged that from and on the first of September, 1902, and thence down to and inclusive of the twentieth day of June, 1903, the defendants conspired. There was proof before the commissioner that the conspiracy was consummated and its end accomplished more than three years prior to the finding of the indictment, and the proceeding was dismissed in spite of the allegations of continuance in the indictment. Of this allegation the court said:

"If the illicit scheme is continued and new overt acts to carry it out occur within the period of limitation, the pleader should charge a *new* conspiracy, and the jury may be warranted from all the evidence in finding the existence of such *new* offense within that period."

In *United States* v. *Greene*, 100 Fed. 941, 946, a proceeding for the removal of the defendant for trial in another district, it was urged that the offense was barred by the statute of limitations. It appeared from the indictment that the fraudulent scheme which had culminated in the conspiracy charged in the indictment had originated prior to the period of limitations, but the indictment charged the conspiracy as having been formed within the period. The court said:

"But as *each new overt act* in furtherance of the common purpose, *becomes in law a new conspiracy*,

> the time of the conspiracy may be laid within the period of the statute of limitations, if the overt act was within that period; the prior combination if established and the later overt act being evidence from which a jury may infer the *new* conspiracy."

In *United States* v. *Barber*, 157 Fed. 889, 890, the court directed a removal for trial in another district upon an indictment which charged the formation of the conspiracy at a time prior to the period of limitation because it contained averments of overt acts performed within that period. In so directing, however, it expressed its doubts as to the sufficiency of the pleading, and based its decision solely on the rule that in removal proceedings the technical sufficiency of the indictment was not open to attack.

There is nothing in the cases of *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, and *United States* v. *McAndrews and Forbes Company*, 149 Fed. 823, cited by the government (pp. 53–56), which supports the theory that the crime of conspiracy is a continuing offense, or which is not entirely consistent with the views expressed above, as to the renewability doctrine. In the *Trans-Missouri* case, Mr. Justice Peckham, speaking of the Sherman Act, pointed out that the liability to punishment under the criminal provisions of the act was entirely distinct and separate from the civil remedy by injunction, and said:

> "There can be no question of any act being regarded as a violation of the statute which occurred before it was passed. After its passage, if the law be violated, the parties violating it may render themselves liable to be punished criminally; but not otherwise."

Yet, if the government's argument in the brief now

submitted be sound, Mr. Justice Peckham should have recognized that as the Freight Association agreement, although antedating the Sherman Act, continued in force, the parties became criminally liable thereunder without doing any act whatever and continued so unless they affirmatively abandoned the agreement. Of course, if the point now made by the United States had been suggested in the *Trans-Missouri* case, the court would have ruled that in order to constitute a violation of such a statute, and to prevent any retrospective or *ex post facto* operation, some act under the pre-existing agreement would have to be done sufficient to show or from which could reasonably be inferred the renewal or re-adoption of the old agreement. In the case of *United States* v. *McAndrews and Forbes Company*, there was no question of the statute of limitations, and the acts constituting the alleged criminal agreement, combination or conspiracy were charged to have been done within three years of the finding of the indictment.

Nor is there anything in the cases of the *Northern Securities Company* v. *United States*, 193 U. S. 197, and *Loewe* v. *Lawlor*, 208 U. S. 274, also cited by the government, which in any way sustains the proposition that parties can render themselves liable to be punished criminally under the Sherman Act without doing any act whatever. Both were civil cases: the first brought under section 4 of the act, which vests jurisdiction "to prevent and restrain violations of this act," and the second under section 7, which enables any person injured in his business or property to sue in a federal court and recover three-fold the damages sustained by him. Of course, the

theory of the first suit and the relief sought were to restrain future acts; in the second the damages formed the essential element of the cause of action. In neither was any question involved as to the statute of limitations, and in neither was the court even remotely called upon to determine whether the criminal offenses defined in the Sherman Act could possibly in contemplation of law be committed without the doing of a single act.

The case of *People* v. *Mather*, 4 Wend. 229, is frequently cited as a leading case on conspiracy. The defendant was indicted for a conspiracy to abduct one Morgan. The indictment charged the formation of the conspiracy at Gaines, in the County of Orleans, State of New York, on the 13th of September, 1826. It appeared from the evidence on the trial that the plot had had its inception at an earlier date in Canandaigua county, that Mather had joined in it after it was under way, by cooperating in Orleans county, that it had been followed by the abduction of Morgan, and that there was reason to believe that it had resulted in the murder of Morgan. Upon the trial, two questions arose as bearing on the nature of conspiracy, first, as to the right to indict Mather, who had not participated in the scheme at the time of its inauguration in Orleans county; and, second, as to the right of a witness to decline to answer a question put to him on the ground that it might tend to criminate him.

As to the first of these questions the court decided that the indictment was properly found, saying (p. 259):

> "I admit that it is the illegal agreement that constitutes the crime; when that is concluded the crime is perfect, and the conspirators may be convicted if the crime can be proved. No overt act need be shown or

> even performed to authorize a conviction. If conspirators enter into the illegal agreement in one county, the crime is perpetrated there, and they may be immediately prosecuted; but the proceedings against them must be in that county. If they go into another county to execute their plans of mischief, and there commit an overt act, they may be punished in the latter county without any evidence of an express renewal of their agreement. The law considers that wherever they act, there they *renew*, or, perhaps, to speak more properly, they continue their agreement, and this agreement is *renewed* or continued as to all whenever any one of them does an act in furtherance of their common design."

As to the second question, the court decided that the witness could rightly claim his privilege. not, however, because he was subject to prosecution for any conspiracy, that crime being barred by the statute of limitations, but because there was a probability that the abducted person had been murdered, and murder is a crime for which there is no limitation. The court said (p. 255, 257):

> "Daniels [the witness] could not be indicted for conspiring to carry off or to imprison Morgan, . . . because the statute of limitations furnished a bar to the proceedings . . . If I am correct in my conclusion that the offense of accessories to a murder before the fact is not included within the statute of limitations, it is certainly not improbable that the witness Daniels might have had a fair claim to the privilege he asserted."

In the case of *Ochs* v. *The People*, 25 Ill. App. 379, affirmed in 124 Ill. 399, and cited by the government in its brief at p. 48, the indictment charged a conspiracy formed on November 1, 1885 (p. 393). It was filed April 2, 1887 (p. 395), and it averred a crime committed within the period of the limitation (p. 416). The proof showed

an antecedent conspiracy and the commission of overt acts within the period by all the defendants. The jury thereupon convicted them. There was in this case evidence from which a jury would be fully justified in inferring that within the period of limitation the defendants had again consciously participated in an act in furtherance of the conspiracy and had thus renewed their offense. Only this question of the sufficiency of the evidence to support the verdict of the jury was involved. In affirming the conviction, the court said (p. 416):

> "It being shown that a conspiracy was in existence, every overt act in furtherance of the objects of the conspiracy was, at least as to the person acting, *a renewal of the conspiracy*. To warrant a conviction, therefore, all that was necessary was to establish an existing conspiracy before and at the commencement of the period of limitation and overt acts in furtherance of the conspiracy afterwards. That such overt acts were shown as to *all* the plaintiffs in error, is . . . beyond controversy."

In the Supreme Court of Illinois on appeal, the opinion dealt with the matter in the same way. The conscious participation of the defendants in the acts performed within the period was fully appreciated by the court. It said (124 Ill. 399 at 427):

> "The evidence shows, satisfactorily, that Ochs and Wasserman were members of the conspiracy previous to October 3, 1885, and that they adhered to it afterwards, during the whole interval of time to December 6, 1885, *by their co-operation*, as members of the board, with their fellow-conspirators, in the passing of these false and fraudulent bills."

In *Noyes* v. *State*, 41 N. J. L. 418, the defendant was convicted upon proof that a conspiracy which had been originally formed in New York had been followed by an

overt act committed by him in New Jersey. The question arose as to whether or not the offense was actually committed within the jurisdiction of the courts of New Jersey. The jurisdiction was sustained because it was established that one of the original conspirators had participated with the defendant in the act done in New Jersey, and the *ratio decidendi* appears in the following extract from the opinion (p. 424).:

> "By such joint act the conspiracy was *renewed* and partly executed in this State, in the county of Essex, and . . . thus this crime became cognizable by the courts of that locality."

The question of the renewability of a conspiracy arose in relation to the statute of limitations in the case of *Commonwealth* v. *Bartilson*, 85 Pa. St. 482, 486, upon the consideration of a question of pleading. It was there ruled—in strict conformity with the doctrine of the renewability of conspiracy—that an indictment which alleges a continuing conspiracy prior to the period of limitation and continued within it is bad. The indictment in that case, which contained two counts, charged the defendants with a conspiracy to cheat and defraud one McCoy. The first count laid the crime as of the 20th day of December, 1874, which was over four years prior to the finding of the indictment (the statute of limitations being two years). There were alleged, however, in this count a number of over acts, of which some were within two years of the finding of the indictment, and as to each of these overt acts it was averred that it was "in pursuance and as a renewal of" the said conspiracy. The second count laid the offense as having been committed on the 21st day of May, 1877, the day before the

finding of the indictment, and did not set forth any overt acts. A bill of particulars of this count was furnished by order of the court, and disclosed that it was based upon practically the same evidence as that charged in the first count.

The court held that the first count was bad; that its averments were equivalent to a charge of conspiracy formed upon the 20th day of December, 1874, with a *continuando* down to and through the dates of the various acts; that conspiracy was not a continuing offense but one which was renewable, and that hence the count charged not only one offense, which was barred by the statute of limitations, but a number of other offenses, which rendered it duplicitious. It was also held that the second count was good because it charged a conspiracy formed within the period of limitation, and under it evidence was admissible to establish that though the defendants had once conspired at a period prior to the statutory period, they had engaged in a new conspiracy to the same end within the statutory period. The opinion contains an admirable exposition of the principles which control the determination of the question here at issue. As to the first count the court, among other things, said (p. 486):

> "The conspiracy is averred to have been formed on the 20th day of December 1874. This was more than two years prior to the finding of the bill, and upon that ground the court below quashed the count. It was strongly urged, however, that inasmuch as it was averred in said count that the defendants had in, 'pursuance and renewal of said conspiracy', committed divers overt acts specifically described in said count, the date of one of which at least was within the statutory period, there was a continuance and renewal of the conspiracy from time

to time, and the statute was thereby tolled. This is plausible but unsound. The offense charged was conspiracy. According to all the authorities the conspiring is the essence of the charge, and if that be proved, the defendants may be convicted: Collins *v.* The Commonwealth, 3 S. & R. 220; Commonwealth *v.* McKisson, 8 *Id.* 420; Commonwealth *v.* Judd, 2 Mass. 329; Commonwealth *v.* Tibbitts, *Id.* 536; Commonwealth *v.* Warren, 6 Mass. 74; State *v.* Richie, 4 Halstead, 293; State *v.* Buchanan, 5 Harr. & Johns. 317; People *v.* Mather, 4 Wend. 229. According to the first count, the offense was completed on the 20th of December 1874. The overt acts set forth do not constitute the offense. They are the evidence of it, and are sometimes said to be the aggravation of it. An overt act may or may not be unlawful, *per se.* It is because of its relation to an unlawful combination that it becomes obnoxious to the criminal law. The averment that the conspiracy was 'renewed' from time to time does not meet the difficulty. If it proves anything, it proves too much. The 'renewal' of a conspiracy means to begin it again; to recommence it; to repeat it. *From this it is apparent that each renewal is a new offense; a repetition, it is true, of a former one, but still an offense for which an indictment would lie.* If, therefore, the overt acts were done or committed in renewal of the conspiracy of December 20th 1874, as charged in the count, they aver distinct offenses. It is a well-settled rule of criminal pleading that distinct offenses cannot be joined in the same count. This principle is too familiar to need the citation of authority; we will only refer to the latest case: Hutchison *v.* The Commonwealth, 1 Norris, 472. The difficulty in regard to this count arises merely from a mistake in pleading. *The date of the conspiracy should have been laid within the statutory period.* The Commonwealth must allege and prove a conspiracy within two years. If this cannot be done the Commonwealth has no case. The pleader evidently felt the strain of this part of his case when he introduced the averment that the overt acts were in 'renewal' of the original conspiracy. It

was practically laying an offense with a *continuando;* it was an attempt to prove the existence of a crime within the statutory period by showing its commission outside of such period, and that it had been continued down to a time within it."

As to the second count the court said (p. 489):

"But if the overt act charged in the indictment, or proved to have been done within two years, is sufficient to satisfy the jury of the existence of a conspiracy at that time, it is wholly immaterial when the parties thereto first formed the unlawful combination in their minds, or gave effect to it by concert of action. If it has been *renewed* from time to time, and overt acts committed through a series of years, and one of said acts has taken place within two years, *each renewal constitutes a fresh conspiracy, for which an indictment will lie* It has been held that where a conspiracy had been formed outside of the jurisdiction of the court, an overt act committed within the jurisdiction is evidence of a conspiracy there; Rex *v.* Scott, *supra.* And all who accede to a conspiracy after it is formed become conspirators; People *vs.* Mather, *supra.* For the reasons given, we think the court below erred in quashing the second count."

In the light of these authorities, it is submitted that the sound doctrine is that the crime of conspiracy is not an essentially continuous offense, but that it is subject to renewal and that the renewal may be evidenced by the conscious participation of any of the conspirators in acts done for the purpose of effecting the object of the original conspiracy.

IV.

Nor do the alleged overt acts, even if available, show the commission of the crime of conspiracy within the three years.

But, whether the crime of conspiracy is to be treated as subject to continuance by overt acts or as subject to renewal by such acts, it is submitted that the indictment in the case at bar does not show that the conspiracy charged therein was either continued within the period of the limitation or was renewed by any of the alleged overt acts done during those years.

It should be recalled, however, that the question arising on the record now before the court is not whether the alleged overt acts done in 1907 and 1909 show a renewal of the conspiracy of 1903, for no such charge is to be found in the indictment, and no such contention is advanced by the government in its brief. Indeed, in one part of this brief, as we have already noticed, the doctrine that a conspiracy may be renewed by overt acts done to effect its object is distinctly repudiated (p. 45). The only contention seems to be that the alleged overt acts show the actual continuance of the original conspiracy; that is, the continuance of the commission of the criminal offense of conspiring throughout the whole period. That these allegations do not show this must be evident from a simple perusal of the indictment. It is only by going outside the record and indulging in speculation and surmises that the government attempts to show that the acts could in any way be construed as connected with the original conspiracy, or as germane to any of its objects or

purposes. The original conspiracy as charged in the indictment did not contemplate any such acts in 1907 and 1909.

It is to be always remembered that among the most fundamental of the rules of criminal pleading are those that require (1) that "all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication" (*Pettibone* v. *United States*, 148 U. S. 197, 202; *United States* v. *Hess*, 124 U. S. 483, 486); (2) that facts must be pleaded and that conclusions are of no avail (*United States* v. *Cruikshank*, 92 U. S. 542, 558); *In re Greene*, 52 Fed. 104, 111); (3) that the charging part of an indictment for conspiracy must be sufficient in itself without recourse to the allegations of overt acts (*United States* v. *Britton*, 108 U. S. 199, 205), and (4) that where the facts alleged are susceptible of two interpretations, in one of which they lead to a conclusion of guilt and in the other to a conclusion of innocence, "a court of justice has no alternative; it must pronounce in favor of innocence" (*The Bothnea & The Jahnstoff*, 2 Wheat. 169, 177; *Coffin* v. *United States*, 156 U. S. 432).

If the indictment in the case at bar be analyzed, it will be found that the averments which must be relied upon by the government for the purpose of establishing that the crime was committed within the three years will not suffice for that purpose. The only averments which even purport to relate to a time within the period of limitation are the averments that continuously and at all times during the period of six years, to

wit, from the 30th of December, 1903, until and on the day of the finding of the indictment, the defendants were engaged in a conspiracy in restraint of trade, the averments of the duration of the control which was contemplated by that conspiracy, namely, at least one year, and the averments of the acts performed in pursuance of it during the period subsequent to July 1st, 1906. None of these averments are sufficient to show the actual commission, that is, continuance, of the crime within the three years.

The first of these averments to the effect that the defendants engaged in a conspiracy on the 30th of December, 1903, and continuously thereafter during the entire period of the six years, may be dismissed at once as a mere statement of the pleader's conclusion which, unless supported by allegations of fact, cannot avail as a charge of the actual commission of the crime within that period. This result is well supported by the decisions of this court. *Cruikshank* v. *United States*, 92 U. S. 542, 558; *Pettibone* v. *United States*, 148 U. S. 197, 203. See also the authorities discussed above at p. 47 *et seq.*, which establish that the allegation of a *continuando* should be disregarded as mere surplusage.

Now, even if an indictment could be held to charge a continuing offense because it charged an agreement which contemplated the doing of acts in the future, it would be apparent that, in order to impute continuance up to and within any particular period, it must appear that the agreement provided or contemplated that acts should be done within that particular period. This must appear by direct averment and not through processes of reasoning

or inference, and if the averments of the nature of the agreement are equally consistent with the conclusion that, though it contemplated acts in the future, it did not contemplate that they should continue within the period of the limitation, as with the theory that it contemplated that it should continue within that period, it cannot be held to charge that they were so to continue. It is well settled that where it is essential to criminality that particular acts shall have been done at a particular time, the allegation that they were done at that time must be so distinct as to preclude the possibility that they were done at some other time. This principle is well illustrated by the decision of this court in *United States* v. *Simmons*, 96 U. S. 360, 363. This case arose under section 3266 of the Revised Statutes. The court held the indictment fatally defective on the ground that, while it averred that the defendant had caused a still and boiler and other vessels for the purpose of distilling to be used in a certain building where vinegar was manufactured and produced, it did not charge that vinegar was being manufactured and produced in that building *at the time* the offense was alleged to have been committed. The court said (p. 363):

> "Nor does it sufficiently appear that vinegar was manufactured or produced in the building and on the premises referred to *at the time* the still and other vessels were used for the purpose of distilling. *It is consistent with the averments* that the vinegar had been manufactured or produced prior to the date when the alleged distilling occurred. The two facts must co-exist, in order to constitute the offense described in the statute."

In the case at bar, the indictment in its allegations of

the time during which it was contemplated that the control of the Pennsylvania Company should continue, is scrupulously careful to avoid the specification of any definite period beyond the term of one year from the 4th of January, 1904, and it contains no averment which suffices to charge that continuance of such control during any specified time beyond the one year was contemplated or agreed upon (rec. pp. 5, 6). There is, therefore, no allegation that the parties agreed to conspire for any longer period than the year.

The government argues in its brief (p. 37) that the mere allegation that the conspiracy contemplated the ruin and decay of the facilities of the Pennsylvania Company suffices to impute continuance through all time. This is not and cannot be the law, and such an averment cannot be held to have the elements of precision necessary to the charge of the commission of an offence at a particular period. There is no allegation that such ruin and decay resulted from the acts of the conspirators or that they ever agreed to or contemplated acts subsequent to July 1, 1906, for the purpose of effectuating such ruin or decay.

If the indictment in the case at bar is to be held to charge the commission of an offense, or the continuance of an offense, within the period of limitation, it must be because it charges the commission of some act within that period of such an unequivocal character as of itself to prove that the conspiracy was then being continued.

These essential averments nowhere appear in the body of the indictment, but must be found, if they are to be found at all, in the allegations of overt acts alleged to have been done in pursuance of the conspiracy. Yet

these allegations, as we have seen (*United States* v. *Britton*, *supra*), are not available. But if available, they would, in the case at bar, be wholly insufficient. It may ordinarily be true that when the commission of the offense of conspiracy has been duly charged in the indictment within the period of limitation, allegations of overt acts which do not of themselves suffice to constitute the offense or shows its commission will be sufficient. In that case, the allegations of overt acts are inserted by way of aggravation, or merely to satisfy a statutory requirement that some overt act in addition to the act of agreeing be alleged, or as a bill of particulars of the claim of the prosecution. Even in that case, the acts must be such as clearly tend to effect the object of the conspiracy. Thus in *United States* v. *McLaughlin*, 169 Fed. 302, 307, Judge Lochren, sustaining a demurrer to an indictment for conspiracy, said:

> "It seems to me that an overt act must be an act which has a tendency at any rate to carry out the object of the conspiracy, or in some way tends to make it effectual. It may not be sufficient of itself to complete the offense, but it should have a tendency to do so. I do not imagine that any letter which could have no tendency to mislead the corporations which are the alleged victims could be claimed to be an overt act at all. It must be an act having a tendency to effectuate the object of the conspiracy. . . . It seems to me that the overt acts alleged do not support the charges of fraud which are the subject of the alleged conspiracy, and that they are immaterial; that there is not in the overt acts charged in the indictment anything germane to the subject of the alleged fraud."

And in the latest case upon the point, *Lonabaugh* v. *United States*, 179 Fed. 476, 481, the Circuit Court of

Appeals, Eighth Circuit, speaking by Circuit Judge Van Devanter, decided that the overt act should clearly be directed to the attainment of the object of the conspiracy, saying (at p. 481):

> "Nor is it enough that the overt act be directed to the attainment of some other object; it must be directed to the attainment of the object which brings conspiracy within the interdiction; and when that object is attained 'the object of the conspiracy,' in the sense of the statute, is effected."

But a different rule is applicable where the averment of the conspiracy itself does not suffice to charge its commission within the period of limitation and the overt acts are relied upon to bring it within that period and, as it is sometimes inaccurately suggested, to toll the statute. As those allegations furnish the sole basis from which a court can conclude that the offense has been actually committed within the period of the limitation, the acts must manifestly be such that, taken in connection with the charge of conspiracy formed at an earlier period, they will suffice to show that the conspiracy was actually continued at the time of their performance. In order that an act may suffice for this purpose, it must be of such a character as to lead to the conclusion that the conspiracy was then being pursued. If it is reasonably consistent with any other conclusion, if it is consistent with innocence, or if it does not exclude any other reasonable hypothesis, it cannot be sufficient to show the commission of a crime. This results inevitably from the fact that such acts are admissible only to establish circumstantially the existence of the ultimate fact, which is the conspiracy itself, and from the rule, which is settled beyond dispute,

that where an ultimate fact is to be established by circumstantial evidence, the chain of circumstances must be such as to exclude every reasonable hypothesis other than that of guilt. *Lopez* v. *Campbell*, 163 N. Y. 340, 347.

If the acts charged in the indictment to have been done in 1907 and 1909, to wit, overt acts 13 to 18 (rec. pp. 15 to 18) be considered in the light of these principles, it will be clear that they cannot be held to show the actual commission of the criminal offense of conspiracy, and that proof of those acts, even in connection with the antecedent conspiracy alleged in the indictment to have been formed in 1903, would not justify the submission to a jury of the question whether that conspiracy was continued by those acts into the years 1907 and 1909.

This becomes especially clear if the alleged overt acts be considered in connection with the allegations of the plea of the defendant Kissel, which are admitted by the demurrer.

It appears by the plea of the defendant Kissel (rec. p. 33) that prior to the alleged overt acts (13 to 18), done in 1907 or 1909, and on October 2, 1906, a receiver of the property of the Pennsylvania Company was appointed by a court of record and of general jurisdiction in the State of Pennsylvania, that such company and its officers and agents had been duly enjoined from in any way intermeddling with or in any manner disposing of its assets and property, and that thereupon one George H. Earle had duly qualified as such receiver, and had duly taken exclusive possession of all and singular the assets and property of the company, and *exclusive charge and control of its business, affairs and choses in action*, and had ever since duly continued in such possession, charge and

control. It further appears by such plea that the defendant Kissel was not a party to and did not participate in the said action or the said proceeding for the appointment of a receiver, and did not directly or indirectly procure, induce, counsel, advise, aid or abet the institution of such action, the appointment of said receiver, or the making of the orders restraining the company, its officers and agents, from intermeddling or in any manner disposing of its books, moneys, assets and property, and appointing the receiver. To repeat, these allegations were admitted by the United States in and by its demurrer.

The object and purpose of these allegations were to show that the alleged overt acts of 1907 and 1909 could not be held on the record before the court to have been done in order to effect the object of the original conspiracy, because the refinery was then no longer in the control of the conspirators, the business and affairs of the Pennsylvania Company were in the exclusive charge and control of the receiver and of the court, and none of the alleged overt acts could interfere with such exclusive possession and control or in anyway affect the right of the receiver to engage in interstate commerce.

If the object of the original conspiracy in 1903 in alleged violation of the Sherman Act was to keep the refinery of the Pennsylvania Company closed, and by securing and retaining control of its business and affairs to prevent competition with the American Company, and if, as admitted by the government's demurrer, a receiver had taken exclusive possession and control of its property, assets and business on October 2, 1906, and had ever since continued in such exclusive possession and control,

and if the company itself and its officers and agents had been enjoined from intermeddling with the property, it reasonably followed that the allegations as to the overt acts done in 1907 and 1909 wholly failed to show how such acts could possibly have been done to effect or could possibly effect the object of the original conspiracy of 1903. The court below was therefore warranted in declaring in its opinion that "these alleged overt acts had no tendency to accomplish the object of the conspiracy" (rec. p. 60).

It is essential to bear in mind that the case was before the court below, as it is here, on the record and not on hypothetical facts stated in the government's brief, which facts the indictment does not allege and which the government did not offer or ask to prove, or upon "any possible supposition" such as the government's brief indulges in (p. 61 *et seq.*). In demurring, the government admitted that Receiver Earle, and not the conspirators, had been in exclusive possession and control since October, 1906. It cannot now suggest facts outside the record inconsistent with the allegations thus admitted by its demurrer. If the government had wanted to show the facts now suggested in its brief (pp. 56–66), it would have duly traversed the pleas, but it elected to stand in that respect on its demurrer. We are not called upon to challenge the suggestion that any act harmless and innocent on its face may when connected with other acts constitute part of an attempt to commit a crime or be done to effect some criminal object. Nor are we called upon to indulge in speculations as to what may be imagined or conceived to have occurred in addition

to what the record shows. The government in and by its demurrer submitted to the court the question of law whether the allegations of overt acts done in 1907 and 1909 showed the commission of the crime of the conspiracy within the three years preceding the finding of the indictment. The perusal of the allegations of the overt acts will demonstrate that they do not show the continuance of a pre-existing conspiracy, even if they could properly be referred to now in order to bolster up an indictment otherwise fatally defective.

(1) It is alleged (rec. p. 15) that on February 13, 1907, the defendants Thomas, Donner, Senff and Mayer attended a meeting of the board of directors of The American Sugar Refining Company and each voted for and thereby secured the adoption of the following resolution:

> "*Resolved*, That in accordance with the resolution passed by the stockholders at their last annual meeting, the secretary, in the name of and for the company, send to Mr. John E. Parsons, the counsel of the company, a letter giving to him a copy of the resolution of the stockholders in reference to proceedings in the Segal matter; asking him to co-operate in defending against any such proceedings; and agreeing as to him that the company assumes the entire responsibility of what has occurred in the Segal matter; and that it will defend, protect, and indemnify him; and in the event of a suit and possible recovery, that it will either pay the same, or if any appeal shall be taken, that it will stay proceedings and secure and, if and when required, make payment."

This resolution, as appears on its face, was adopted in accordance with a prior resolution of the stockholders of the American Company. It was adopted more than four months after the appointment of George H. Earle as Receiver of the Pennsylvania Company. It purports only

to deal with the defense of threatened legal proceedings and with indemnity for past acts in the event of suit and possible recovery. It contemplates and provides for no present or future act tending to keep the refinery of the Pennsylvania Company closed or to interfere in any way with its business, assets and affairs then admittedly in the exclusive possession and control of a receiver. There is absolutely nothing in this resolution tending to furnish even a scintilla of evidence that the conspiracy of 1903 still existed or was thereby renewed or that the indemnity of the President and Counsel of the Company could in any possible way effect the object of the original conspiracy. Moreover, it is to be observed that the act thus alleged to have been performed is in nowise connected by appropriate averments with the subject matter of the original conspiracy and that there is nothing to indicate that the Segal matter there referred to was the loan or conspiracy of 1903. The resolution amounts to no more than an agreement by parties who are morally responsible for an act done in the past, to relieve their agents and indemnify them. This is not a criminal act. If the charge under consideration were any other than conspiracy, this proposition would be too plain to require argument. If Mr. Parsons had committed a trespass upon the real property of Mr. Segal in 1903 for which he was subject at that time to civil and criminal liability, no one would dream of holding that any persons who came forward to contribute to the defense of a suit, either civil or criminal, or who agreed to assist him in paying, or to relieve him of the burden of paying any judgment that might result therefrom, could, by such acts,

be renewing the trespass or rendering him or themselves criminally liable for the trespass.

(2) It is alleged (rec. p. 16) that Mr. Parsons, General Counsel of the American Company, wrote a letter on February 15, 1907, to the Secretary of the American Company, acknowledging the receipt of a copy of the resolution referred to in the last paragraph and stating that Receiver Earle had for some reason delayed proceedings, that the Department of Justice ought to refuse to aid his claim, that Mr. Johnson described the claim as farcical, and that Mr. Parsons both on the company's account and his own would co-operate in defending any proceeding which might be taken by Mr. Earle. It must impress the court as preposterous, if not trifling, to ask it to rule that this letter of Mr. Parsons to the Secretary of the American Company could in any aspect be held to be an overt act tending to effect the object of the alleged criminal conspiracy of 1903, or that a jury could be permitted to infer a criminal intent therefrom. Surely, an agreement to defend a threatened legal proceeding cannot constitute the commission or renewal of the crime of conspiracy.

(3) It is then alleged (rec. p. 17) that the defendant Kissel on May 3, 1907, wrote a letter to the American Company enclosing vouchers for disbursements previously made in connection with the loan to Segal, such as for rent of safe deposit vaults and legal services of lawyers, amounting to $1,658.50, and asking payment. Such a letter may, of course, be evidence against Kissel that he had acted as agent in a Segal matter, but it certainly is not evidence that on May 3rd, 1907, or at any date mentioned in his letter he did any *act* to effect

the object of the original conspiracy of 1903. There is no allegation identifying the loan or connecting it with the loan of 1903. The court is asked to read into this letter a number of hypothetical facts, none of which are alleged in the indictment or in the special plea. Thus, the court is asked to assume without the slightest allegation that Kissel then continued to hold the proxy or power of attorney to vote the stock (brief U. S. p. 63) and that this was the chief foundation of the American Company's continued control over the management of the Pennsylvania Company, utterly disregarding the admitted fact of the exclusive possession and control of the receiver. Reference is made in the government's brief to Kissel's immunity plea as showing that he retained possession of the proxy until May 26, 1909 (p. 63), yet in another part of the brief it is asserted that the immunity plea of Kissel "is not now before the court" (p. 13). It is asserted that this continued possession of the proxy, nowhere alleged in the indictment, tended to effect the object of the conspiracy "because retention of the power of attorney by somebody was essential to its exercise" (p. 63). As matter of fact, the power of attorney was wholly useless in 1907 except as evidence of past acts, for two reasons: first, because Receiver Earle was in exclusive possession and control of the property and business affairs of the Pennsylvania Company, and the latter was enjoined from intermeddling therewith; and, secondly, because the power of attorney was then absolutely inoperative and void, for by its terms it endured only during the life of the agreement of December 30, 1903, that is, to October 1, 1904, or January 4, 1905, as Mr. Segal

might elect, and by law it expired within two months after its date, December 30th, 1903. Under the laws of Pennsylvania, of which the court below was bound to take judicial cognizance (P. L., March 5, 1903, No. 17), it was expressly provided as follows:

> "That stockholders of all corporations of this Commonwealth, wherever residing, who shall be entitled to vote at any corporate meeting or election thereof, shall have and be possessed of the right and power to vote thereat by proxy duly executed by the stockholder, either with or without notarial or other acknowledgment, but properly attested by the signature of a witness, and that one person may be constituted and act as proxy for any number of stockholders: Provided, however, That *proxies dated more than two months prior to any such meeting or election shall not confer right to vote thereat.*"

But, however this may be, the mere writing of a letter by Kissel to the American Company asking payment of past disbursements, could not constitute in and of itself an overt act tending to effect the object of the conspiracy of 1903, or be evidence of the continuance of a criminal intent. *United States* v. *Black*, 160 Fed. 431, 435; *United States* v. *Biggs*, 157 Fed. 264; *United States* v. *McLaughlin*, 169 Fed. 302, 307; *Lonabaugh* v. *United States*, 179 Fed. 476, 479.

(4) It is then alleged (rec. p. 18) that Messrs. Thomas, Donner, Senff, Frazier, Mayer and Parsons attended a meeting of the board of directors of the American Company on the 2nd day of November, 1907, but nothing is disclosed as to what was done at this meeting. It would seem to require no discussion to refute the argument in the government's brief (p. 60) that because at that meeting something *might* have been done to further

a purpose which was conceived four years prior thereto, the court may hold the allegation sufficient to establish the continuance of a criminal intent.

(5) And finally it is alleged (rec. p. 18) that a letter was written by Mr. Parsons on the 19th of April, 1909, in which he says that he will send an advertisement about the Pennsylvania Company bonds to Mr. Johnson, that Mr. Johnson has the matter in charge, and that he, Mr. Parsons, thinks it undesirable to submit the bonds to the action of a possibly hostile committee (p. 18). It is seriously suggested to this court, in the government's brief (p. 62) that this may be construed as an improper act of Mr. Parsons, done intentionally to effect the object of a criminal conspiracy!

As the overt acts averred had no tendency to effect the object of the conspiracy, they could not, even under the theory urged by the government, operate to show the continuance of the offense or its renewal. An act to have that effect—since it would deprive the accused of his legislative amnesty and compel him to account for conduct now long past—ought to tend clearly and emphatically to effectuate the object of the pre-existing conspiracy or to show the continuance of a criminal intent and purpose.

It ought also to be remarked that the indictment does not charge that a single overt act within the period was done by the defendant Harned. As to him, there is absolutely nothing to show that he ever participated in any way in the alleged conspiracy since January, 1904. The theory of the government is that he, nevertheless, indefinitely continued criminally liable for any act of the other conspirators unless he could affirmatively show an actual

abandonment of the conspiracy on his part, and that the burden was upon him to allege and prove such abandonment.

V.

THE SPECIAL PLEAS IN BAR WERE SUFFICIENT IN FORM AND DID NOT IN SUBSTANCE OR EFFECT CONSTITUTE PLEAS OF NOT GUILTY.

The United States further argues that even if the defense of the limitations may be set up by special plea in bar, the form of the special pleas in the case at bar is defective because "the facts as set forth therein in effect constitute a plea of not guilty" (rec. pp. 54–55). This is the only defect specified in the demurrer of the United States, but other defects are now attempted to be assigned, such as duplicity. The contention that the pleas constitute pleas of not guilty should be completely answered by the fact that neither plea directly or indirectly denies the commission of the offense as alleged in December, 1903, or the commission of any of the alleged acts. Hence, each plea would be clearly demurrable as a plea of not guilty.

It is quite true that ordinarily the defense of the limitation under section 1044 of the Revised Statutes will be raised in the simple form of the precedents printed at the end of the government's brief (pp. 74–80), but simplicity was in each of the cited cases practicable because of the form of the several indictments. In the case at bar, however, the allegations of the *continuando* and overt acts in 1907 and 1909 seemed to call for more specific and detailed allegations in the special pleas so as to advise the prose-

cution of the exact issue tendered. The court will observe that each special plea in the first paragraph distinctly alleges the defense of the limitation in the language of section 1044 (rec. pp. 32, 52), and then sets forth that the defendants were not fugitives from justice within the intent and meaning of section 1045 (rec. pp. 34, 53). According to the theory of the government, if the pleas had stopped there, they would have been good. It is, however, submitted that, even if irregular, the remaining allegations of the pleas were strictly and technically unnecessary and can be disregarded. They did no harm; they could not mislead or create immaterial issues, and they tendered no different issue than would have arisen if they had been omitted and the precedents cited by the government followed. A pleading, otherwise good, is not rendered wholly insufficient simply because it contains unnecessary or immaterial allegations. The test is whether, disregarding such allegations, the plea is or is not otherwise sufficient to raise the issue tendered in due form. That is the fundamental purpose of all rules of pleading.

The form in the case at bar is substantially the form in which the plea was interposed in the case of *United States* v. *Hirsch* (see government's brief p. 77). The plea in that case did not confine itself to a mere statement that it appeared on the face of the indictment that the crime therein alleged was barred by the statute of limitations, but averred as a matter of fact that the conspiracy charged in the indictment was completed three years before the indictment was found, and hence raised precisely the same issue of fact which is tendered by the slightly

more elaborate traverse contained in the pleas now before the court.

As it is conceded that the averments of the overt acts were unnecessary (brief U. S. p. 33), and as the indictment is in no way to be aided or affected by them (*United States* v. *Britton*, 108 U. S. 199, 204; *Pettibone* v. *United States*, 148 U. S. 197, 203; *United States* v. *MacAndrews & Forbes Co.*, 149 Fed. 823, 831; *United States* v. *Haas*, 163 Fed. 908, 911), it follows that the denial of the alleged tendency of the overt acts to effect the object of the conspiracy could raise no issue other than would properly arise if the defense of the limitation were pleaded in the form used in *United States* v. *Hirsch*.

But is there any sound reason in the principles of pleading why the allegation in an indictment of the time of the commission of the offense may not properly be denied in a special plea setting up the defense of the statute of limitations, or why a defendant may not deny in a special plea any fact not necessary to be alleged in the indictment but which is inserted for the purpose of anticipating the defense of the limitation? The government, in its brief, candidly admits that if it had attempted to anticipate the defense of the limitation by alleging in the indictment that the defendants had been fugitives from justice, such an allegation could be properly denied in a plea in bar setting up the defense of the limitation (pp. 14, 20). If this be so, then for the very same reasons and on the same principles of pleading, a defendant in a special plea setting up the defense of the limitation should be permitted to deny any allegation which may be inserted for the purpose of anticipating

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that defense or which in effect would, if true, defeat it. In the case at bar, the allegations of the *continuando* of the offenses originally committed in 1903 and the allegations that certain overt acts were done in order to effect the object of the original conspiracy were allegations which, in all fairness, a defendant ought to be permitted to traverse on a plea of the defense of the limitation or of immunity.

Indeed, if an accused could not traverse such allegations by a special plea, he could readily be deprived of the substantial right and important privilege of setting up the defense of the limitation or of immunity by special plea in bar whenever the prosecutor saw fit to frame the indictment with a *continuando* or to insert allegations in anticipation of either defense. It is the settled rule in this court that it is not necessary to the validity of an indictment that it should aver the commission of the offense within the statutory period (*United States* v. *Cook*, 17 Wall. 168), and it is also a settled rule of criminal procedure that the averment of time is not ordinarily material. Bishop's New Crim. Proc., vol. I, sec. 386; *Lorenz* v. *United States*, 24 App. D. C. 337, 387; *Ledbetter* v. *United States*, 170 U. S. 606, 612. Therefore, it would follow that if an accused could not traverse the allegation of time, his rights would be subject to the whim or caprice of the prosecution; for by the mere device of inserting in the indictment a date within the statutory period or alleging a *continuando*, the prosecutor could readily deprive the accused of the substantial privilege and perhaps the vital right of setting up the defense of the limitation by special plea in bar and thereby save himself from further

prosecution. Surely, an accused, even in a conspiracy case, is not at the mercy of the prosecutor as he would be if allegations that trivial and inconsequential acts were done to effect the object of the conspiracy could not be traversed under a defense of the limitation. The fair, just and true rule should be that the right to interpose a special plea in bar implies and includes the right to traverse the allegations of time or any other allegation not consisting of the very gist of the offense, whenever such denial is necessary to present the essential and controlling element of the defense of limitation or immunity or former jeopardy.

Thus, upon a plea of former jeopardy, of pardon, or of immunity, the issue of fact as to time must constantly and necessarily arise. The identity of the offense charged in the indictment with that which was the subject of the former jeopardy, is often a subject of doubt, and dependent upon the precise time of the alleged offense. This is an issue of fact which it may often be necessary to determine in advance, and in some instances may unavoidably involve a traverse of the allegations of the indictment to which the plea is interposed.

Or, suppose that one who was indicted for a continuing offense had secured a pardon and that the indictment charged the commission of the offense as of a date subsequent to the date of the pardon. To render the pardon available under the plea, it would manifestly be necessary to traverse the date of commission laid in the indictment. Or, again, suppose the accused had duly secured immunity by compulsory testimony, would he be deprived of the right of setting up that defense by special plea if

the prosecution deliberately or inadvertently alleged an erroneous time for the commission of the offense? It would, therefore, seem only common fairness and justice that a plea in bar may traverse at least the date at which the offense is charged to have been committed, when necessary to set up a special defense; and this is all that in any view of the defendants' pleas they can reasonably be claimed to have attempted to do.

An illustration of such a situation under the defense of former jeopardy is to be found in the facts presented in *Matter of Neilsen*, 131 U. S. 176, 186. There the defendant had been convicted of the offense of cohabiting with more than one woman, and it was sought to try him again for an act of adultery charged to have been committed upon the day following the period of the cohabitation alleged in the former indictment. He interposed a plea of *autrefois convict*, to which the government demurred. It appeared by the plea that the period of cohabitation had in fact continued beyond the time laid in the first indictment and included the day of the adultery laid in the second indictment. This court held that the adultery was included in the continuing crime of cohabitation, that that crime constituted a single offense, embracing the entire period up to the time of the indictment, and that hence the act of adultery was included in it, *though averred as of a day later than the period laid in the former indictment.* It is true that this case did not present any traverse of the indictment to which the plea was interposed and involved merely proof of matter extraneous to the indictment upon which the former conviction was had. But let us suppose that in

that case the indictment, for the purpose of avoiding the plea, had laid the adultery as committed on the day after the finding of the first indictment for cohabitation. Concededly the act of adultery, if committed on that day, would not be barred by the conviction for the cohabitation. Suppose, then, that the accused had ceased to cohabit on a date preceding the finding of the first indictment, and had committed no act of adultery subsequent to that time, and that hence it became necessary to the preservation of his rights to establish that the date laid in the indictment was erroneous. Manifestly, he could do this only under a plea of former jeopardy. Is it the law that he could not so plead if he had necessarily to traverse the allegation of time? Yet if he had to interpose a plea which did not traverse the date and merely set up the record of the first conviction, his plea would be bad on its face and demurrable. If he pleaded not guilty, he would surely suffer conviction despite his prior jeopardy; nor would he be saved by the variance in time, because that constitutes only an immaterial variance. So the defendant would be twice punished for an offense merely because it was not open to him to traverse in a special plea of former jeopardy the immaterial allegation of time contained in the indictment.

It is, therefore, submitted upon this point of pleading that the pleas in bar were sufficient in law to set up the defense of the limitation; that this is so whether the crime of conspiracy be held to be continuous or non-continuous, and that the court below committed no error in overruling the demurrer of the United States. This view alone is sufficient to sustain the judgment below.

VI.

The pleas are not duplicitous.

The government's contention that the pleas, if construed to traverse any material fact averred in the indictment, would be duplicitous (p. 31) as involving pleas of not guilty as well as pleas of the statute of limitations, is met by two answers. First, as pleas of not guilty they would be incomplete and demurrable, since, if there were no statute of limitations, the failure to traverse participation in the conspiracy at its inception would admit the commission of the offense. There is, in fact, no denial of any material allegation of the indictment. A demurrer for duplicity lies only where the pleading unites two sufficient pleas. 22 Cyc. 387; 10 Encyc. Plead. & Proc. p. 535; 1 Bishop's New Crim. Proc., sec. 440; Wharton's Crim. Plead. & Prac., sec. 243; *United States* v. *Patty*, 2 Fed. 664, 667; *State* v. *Thompson*, 31 Utah 228, 232; *Commonwealth* v. *Simpson*, 9 Metc. 138, 141; *Commonwealth* v. *Stowell*, 9 Metc. 569; *Polinsky* v. *People*, 73 N. Y. 65, 72; *People* v. *Kane*, 43 N. Y. App. Div. 472, 474 note, aff'd 161 N. Y. 380; *Rosekrans* v. *People*, 3 Hun 287, 294. Secondly, the objection that the plea is duplicitous is a technical one which must be specifically urged in order to be available. *Pooler* v. *United States*, 127 Fed. 509, C. C. A.—1st Cir.; *Kilbourn* v. *State*, 9 Conn. 560, 563; Bishop's New Crim. Proc., vol. I, sec. 777, sub. 1; 7 Encyc. Pl. & Pr. 243. No such defect as duplicity was urged in the demurrers (rec. pp. 54, 55).

VII.

IF NO ERROR WAS COMMITTED BY THE COURT BELOW, THE FINAL JUDGMENT SHOULD NOT BE REVERSED SIMPLY TO PERMIT THE UNITED STATES TO PLEAD OVER.

The last point of the brief for the United States urges (p. 72) that the court should grant a new trial, because the United States did not plead over or traverse the special plea after its demurrer had been overruled. This is asked even if it be held that the court below did not err in not granting what was not asked.

A number of assignments of error made when the writ of error was taken out stated that the court below erred in dismissing the indictment without permitting the United States to traverse the special pleas in bar and without requiring the defendant to prove the facts alleged in his plea (see assignments 13–18 and 45–46, pp. 73–74, 82). As matter of fact, these alleged errors were not in any way or at any time called to the attention of the court below. The record shows, by the order and certificate of the trial court (p. 69), that the order and judgment in the case at bar were settled upon due notice to the United States and approved as to form by its attorney two weeks after the filing of the opinion; that they were subsequently and two weeks later re-settled upon application of the United States; that at no time prior to the entry of the order and judgment or the re-settlement thereof, was any suggestion made by the United States to the court or to the defendant's attorneys that the United States did not intend and elect to stand on its demurrer, but desired to be permitted to plead over and traverse the special plea in

bar, and that no application or motion was at any time made to the trial court by the United States for leave to plead over and traverse the allegations of the defendant's pleas in bar, although the United States had almost an entire term after the entry of judgment in which to make such motion or application. The circumstances under which the trial court came to make such certificate appear in the record, at pages 68–69, and the authority of the court to grant such certificate in order to make the record clear and prevent misapprehension cannot be doubted. *Gagnon* v. *United States*, 193 U. S. 451, 456; *In re Wight, Petitioner*, 134 U. S. 136, 143; *United States* v. *Adams*, 9 Wall. 661, 663; *Phelps* v. *Mayer*, 15 How. 160, 161; *Kelly* v. *United States*, 27 Fed. 616, 617; *In re Welty*, 123 Fed. 122, 125; Bishop's New Crim. Proc., vol. I, sec. 1343.

It is true that the United States in its brief does not urge upon this point any specific error of the trial court, but, nevertheless, it asks a reversal in order that it may be permitted to traverse the plea in bar as fully as if it had asked leave to plead and it had been denied, with due exception on its part. It would be difficult, of course, to perceive how it could be suggested that the court below erred in not granting the United States leave to plead over when it is conceded in its brief that it did not even ask and did not want any such leave (pp. 32, 72).

If we are correct in assuming that the function and appellate jurisdiction of this court on writs of error taken under the act of 1907 is as in all cases of error, there ought to be no jurisdiction to reverse except upon error

shown, and the failure of the government to apply to the court below for leave to plead over should preclude it from now insisting that there was error in that respect. *Alexander* v. *United States*, 138 U. S. 353, 355; *Lloyd* v. *Preston*, 146 U. S. 630, 645.

In *Allis* v. *United States*, 155 U. S. 117, 122, Mr. Justice Brewer said:

> "Evidently the claim of coercion is an afterthought from subsequent study of the record. But it is settled that no such afterthought justifies a reviewing court in reversing the judgment. A party must make every reasonable effort to secure from the trial court correct rulings or such at least as are satisfactory to him before he will be permitted to ask any review by the appellate tribunal; and to that end he must be distinct and specific in his objections and exceptions."

The court then quotes with approval the following language from *Harvey* v. *Tyler*, 2 Wall. 328, 339:

> "However it might pain us to see injustice perpetuated by a judgment which we are precluded from reviewing by the absence of proper exceptions to the action of the court below, justice itself and fairness to the court which makes the rulings complained of, require that the attention of that court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of exception."

This rule requiring due exception is followed even in capital cases. *Tucker* v. *United States*, 151 U. S. 164, 170; *St. Clair* v. *United States*, 154 U. S. 134, 153; *Lewis* v. *United States*, 146 U. S. 370, 379.

The same rule obtains in criminal cases in New York. Thus, in *People* v. *Jackson*, 196 N. Y. 357, 362, recently decided, Chief Judge Cullen said:

> "To permit the party to remain silent and suffer the error to go unchallenged and claim on an appeal from an adverse judgment the benefit of the error, as if objection and exception had been taken, would not conduce to the proper administration of justice nor tend to secure a fair trial for the defendant, but simply give him an opportunity to reverse on appeal a proper judgment."

A trial court should not be charged with error and its judgment set aside in a criminal case on the appeal of the United States on the ground that the court failed to grant rights or privileges never asserted or asked for. The act of 1907 is sufficiently progressive, if not revolutionary, in criminal procedure, and surely Congress did not contemplate that it was granting to the prosecution in criminal cases the right to secure more than a review of errors committed in the court below.

No case that we have been able to find has held under section 701 of the Revised Statutes that the court may reverse or modify a judgment in a criminal or civil case where no erroneous ruling by the court below has been shown. In all cases of the reversal or modification of a judgment under that section, error was shown to have been committed. The court is now asked by the government to give it the same benefit as if it had duly asked the court below for leave to withdraw its demurrer and plead over and thus mend its hold notwithstanding its deliberate election not to plead over. In other words, the court is expected to rule that under the Criminal Appeals Act of 1907, it has jurisdiction to reverse or modify without error and due exception. Constitutionally speaking (Art. III, sec. 2), the court, of course, is exercising appellate jurisdiction. Under

Jones v. United States, 179 U.S. 584, 594

the circumstances, to modify the judgment and grant a new trial without error below would be the exercise of a power belonging properly and strictly to a court of original jurisdiction and not to a court of errors. It is submitted that in criminal cases this court and the Circuit Courts of Appeals are courts for the correction of errors exclusively. *Whitworth* v. *United States*, 114 Fed. 302, 304.

Supplementing these suggestions which may probably be deemed wholly sufficient to dispose of this point, it may be interesting to consider the condition of the law as to the right to plead in criminal cases and particularly in misdemeanors. At common law there was no right to plead over in any case involving a charge of misdemeanor. *Heike* v. *United States*, 217 U. S. 423, 430. Under this rule, a defendant could not plead over when a demurrer to his plea in bar was sustained (*Commonwealth* v. *Golding*, 14 Gray 49; *The State* v. *Epps*, 36 Tenn. 552, 554; *Reg.* v. *Strahan*, 7 Cox C. C. 85, 86; *Reg.* v. *Goddard*, 2 Ld. Ray. 920, 922; *The King* v. *Taylor*, 3 B. & C. 502; *Reg.* v. *Faderman*, 4 Cox C. C. 359, 382; *United States* v. *Watkins*, 3 Cranch C. C. 441, 551; 12 Cyc. 362; Chitty, Crim. Law, vol. I, p. 442; Colby, Crim. Law, vol. I, p. 277; Archbold, Crim. Prac. & Pl. vol. I, [Pomeroy's 8th ed.], *p. 116), and logically the same reasons would apply and control if the demurrer was overruled and the plea held sufficient in law. In any event, however, even where the strict rules of the common law have been relaxed, most of the cases hold that it is wholly a matter of discretion in the trial court whether to permit an accused to plead over in misdemeanor cases

(*Evans* v. *Commonwealth*, 3 Metc. 453, 457; *Commonwealth* v. *McGovern*, 10 Allen, 193, 194; *Commonwealth* v. *McCormack*, 126 Mass. 258; *State* v. *Wilkins*, 17 Vt. 151, 157; *Reg.* v. *Strahan*, *supra*); but no decision has ever intimated that it was error not to grant leave to plead over when no request or motion so to plead over had been made in the trial court. *State* v. *The Passaic County Agricultural Society*, 54 N. J. L. 260, 262; *United States* v. *Quinn*, 8 Blatchf. 48, 67. In *The People* v. *Taylor*, 3 Denio 91, the New York law upon the subject was discussed by Chief Justice Bronson, and it was held that in cases of misdemeanor it was doubtful whether the favor of pleading over should be granted, the distinguished Chief Justice adding (p. 98):

> "But if it may be granted by the court of original jurisdiction on overruling the defendant's demurrer, that does not prove that the same thing can be done by a court of review, on a writ of error. There is no precedent for it; and we do not feel at liberty to make one."

See also *Commonwealth* v. *Inhabitants of Gloucester*, 110 Mass. 491, 496.

Moreover, even if the government had requested leave to plead over and the trial court, in the exercise of its discretion, had refused to grant it leave, the ruling, as it involved a matter of discretion, would not be reviewable in this court unless a clear case of abuse of discretion were shown. *Isaacs* v. *United States*, 159 U. S. 487, 489; *Goldsby* v. *United States*, 160 U. S. 70, 74.

CONCLUSION.

For the foregoing reasons, the judgment below should be affirmed on the ground that the trial court committed no error.

Washington, November 3, 1910.

JOSEPH H. CHOATE,
WILLIAM D. GUTHRIE,
HOWARD S. GANS,
WILLIAM C. OSBORN,
Of Counsel for defendant Kissel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 390.

Office Supreme Court, U.S.
FILED.
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JAMES H. McKENNEY
Clerk

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

GUSTAV E. KISSEL AND THOMAS B. HARNED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MEMORANDUM IN REPLY TO SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.

WASHINGTON, NOVEMBER 17, 1910.

JOSEPH H. CHOATE,
WILLIAM D. GUTHRIE,
HOWARD S. GANS,
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Of counsel for defendants in error.

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MEMORANDUM IN REPLY TO SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.

As the principal brief filed on behalf of the United States was wholly silent upon the subject of the four counts purporting to charge the crime of monopolizing (numbers 2, 6, 10 and 14), and the four counts purporting to charge the crime of attempting to monopolize (numbers 3, 7, 11 and 14), these counts were not discussed in the briefs filed by the defendants in error, except in the statement at page 14 of the principal brief, that it was quite apparent upon the barest inspection of the indictment that it did not aver any facts which would suffice to charge the commission of the crime of either monopolizing or attempting to monopolize at any date within the three years prior to the finding of the indictment. Since the government now suggests that these crimes are duly charged to have been committed within the three years,

it becomes necessary to differentiate the conspiracy counts from those charging the crimes of monopolizing and attempting to monopolize.

At the outset, however, it is proper to emphasize, as to all classes of counts, the settled rule, expressly conceded by the government, that "time is not a material element of the offense, and the Government can prove upon the trial that . . . the specific acts alleged occurred at other times than those declared in the indictment." Supp. brief U.S. p. 43; see also *Ledbetter* v. *United States*, 170 U. S. 606, 612; *Lorenz* v. *United States*, 24 App. D. C. 337, 387; *United States* v. *Potter*, 56 Fed. 83, 95. If it were otherwise, as urged in our principal brief (pp. 100–106), the result would be, in almost all cases, to deprive the accused of the right to plead in bar at all, whether the plea were limitation or the similar defenses of jeopardy, immunity and pardon.

As Starkie in his Criminal Pleading (1st Am. ed., pp. 66–67) says:

> "But though time must always be alleged in pleading every material fact, it is never necessary to prove the allegation, unless time be a material ingredient in the offense. So that an overt act of treason may be proved to have been committed on a day different from that laid in the indictment.
>
> "And therefore, upon a second indictment, *the defendant may, by proper averments, show that he has been already acquitted* of that offense upon the first, *though the two indictments allege the offense to have been committed on different days;* for it would be hard indeed if the prosecutor might vary from the day laid in the indictment for the purpose of conviction, and the prisoner could not do the same in order to show a previous acquittal."

And again (at p. 360):

> "Thus, if he be acquitted upon an indictment charging the commission of a murder on the 1st day of March, in the *10th* year of the king's reign, and he be afterwards indicted for a murder alleged to have been perpetrated on the 1st day of March, in the *12th* year of the same reign, he may plead *auter-foits acquit*, alleging the supposed offence to be the same."

It is also important to emphasize that section 1044 of the Revised Statutes prescribes a uniform rule as to all offenses committed against the United States, and extends amnesty for all criminal acts done prior to the three years, whatever may be the nature of the crime, excepting only the capital offense of wilful murder (sec. 1043). So far, therefore, as the defendants are alleged to have committed any offenses, continuous or non-continuous, prior to July 1, 1906, they can not be now prosecuted or punished for them. Their acts, prior to that date, are covered by the statutory amnesty as fully as though they had never been committed.

In the final analysis, the only question before the court is whether the special pleas are sufficient in law to present the defense of the limitation and whether the court below was right in overruling the demurrer of the United States.

I.

As to the counts charging monopolizing or attempting to monopolize.

The monopoly counts attempt to charge the offense of monopolizing by a naked reference to the averments of the conspiracy counts. If we assume everything possible in favor of this novel method of pleading—if we assume

that conspiracy is a continuous offense, that the *continuando* is proper, and that the overt acts are to be given the fullest effect—nevertheless the monopoly counts fail to show or charge the actual commission of the offense within the three years, because they show at best only (1) that the defendants from December 30, 1903, up to July 1, 1909, were continuously conspiring; (2) that in pursuance of the conspiracy they made the agreement of December 30, 1903; (3) that immediately they procured a vote of the directors of the Pennsylvania Company to refrain from carrying on business until the further order of the Board, and (4) that within the three years period they did certain overt acts. The allegation that the defendants continuously conspired is, of course, not at all equivalent to an allegation that they continuously monopolized. Even if conspiracy be a continuing offense, and it be possible to conspire continuously, it is still entirely possible for parties to be continually conspiring to monopolize without ever monopolizing. The *continuando* in the conspiracy counts cannot, therefore, be of any aid to the monopoly counts.

An agreement to monopolize would not of itself constitute the offense of monopolizing unless the object of the conspiracy was alleged to have been effected. Thus, assuming that it were duly alleged that, during the three years prior to the finding of this indictment, the parties had renewed the alleged conspiracy and had done the alleged overt acts in 1907 and 1909. These averments would wholly fail to establish that at any time within the three years the defendants had actually monopolized trade or commerce in raw or refined sugar. The allega-

tion of the indictment that the overt acts committed within the three years were done to effect the object of the original conspiracy, even if this were not merely the pleader's conclusion, would not show that the object of the conspiracy had been actually effected or that a monopoly had been actually established or continued or maintained.

The *continuando* means no more than that the original plot was in *existence* within the statutory period, namely, that the defendants were *of the same mind* in 1906 as they were in 1903, or, in other words, that their *intent was the same* at all times after December 30, 1903. But since the law does not punish intent, it is obvious that this indictment must fail unless there can be found in it some allegation, in addition to the *continuando*, of *an act done within the three years*, and this allegation must be found in the *charging part* of the indictment, for nothing is better settled than that recourse cannot be had to the overt acts to eke out or supplement otherwise inadequate averments descriptive of the conspiracy intended to be charged. *United States* v. *Britton*, 108 U. S. 199, 205.

So, also, as to the counts charging attempts to monopolize. It seems almost preposterous to urge that this offense could be committed and continued six years by simply engaging in a conspiracy and then doing nothing or the trivial and colorless acts alleged to have been done in 1907 and 1909. As Mr. Justice Holmes said in *Northern Securities Co.* v. *United States*, 193 U. S. at p. 409:

> "Not every act done in furtherance of an unlawful end is an attempt or contrary to the law. There

> must be a certain nearness to the result. It is a question of proximity and degree. *Commonwealth* v. *Peaslee*, 177 Massachusetts, 267, 272."

The government in its supplemental brief asserts (p. 38) that "it is expressly averred in these several counts that this monopoly continued during the entire six years previous to the finding of the indictment." This statement the learned Assistant Attorney General sought to support by a reference to the allegations of the charging part of the counts under consideration.

An inspection of the indictment itself will render patent the error of this contention, for the charging part of these counts is that the defendants (p. 18)—

> "... in and by engaging, during the period of time in the same count specified, and in the manner and under the circumstances and conditions, there described, in the unlawful and corrupt conspiracy in that count mentioned, and in and by the committing, at the several times and places in that behalf mentioned, of the several overt acts, in pursuance and to effect the object of said conspiracy in said first count set forth, unlawfully have knowingly and corruptly monopolized a part of the trade and commerce among the several states, to wit," etc.

As to this curious form of averment, it is to be observed, in the first place, that it does not directly charge that the defendants did monopolize or attempt to monopolize, but merely states the pleader's conclusion that in and by the doing of the acts referred to, the accused committed these offences. It is settled by the decisions of this court that such an averment lends no additional force to the facts directly averred, and that unless those facts establish the commission of the offense, and include every element of the offense, the indictment will not be

permitted to stand. In *Pettibone* v. *United States*, 148 U. S. 197, an indictment, which failed to set forth one of the essential elements of the offence, was sought to be supported by a conclusion substantially in the form now before the court. The averment read as follows (p. 201):

> "And so the grand jurors aforesaid, upon their oaths aforesaid, do charge and say" that the said defendants (naming them) "at the said Shoshone County, within the said Northern Division of the District of Idaho, did, on the 11th day of July, 1892, unlawfully, wilfully, fraudulently, and feloniously conspire, combine, confederate, and agree together to commit an offence against the United States, to-wit, to corruptly and by force and threats obstruct and impede the due administration of justice in the aforesaid United States Circuit Court for the Ninth Judicial Circuit, District of Idaho, and did, thereafter, on the 12th day of July, 1892, in pursuance of said unlawful and malicious combination and conspiracy, unlawfully, wilfully, and feloniously, in the manner and form aforesaid, corruptly and by force and threats of violence obstruct and impede the due administration of justice in the aforesaid United States Circuit Court."

The court dismissed the argument that this sufficed to supply omissions in the allegations of fact, in the following words (p. 203):

> "This indictment does not in terms aver that it was the purpose of the conspiracy to violate the injunction referred to, or to impede or obstruct the due administration of justice in the Circuit Court; but it states, as a legal conclusion from the previous allegations, that the defendants conspired so to obstruct or impede."

Moreover, it is to be noted that the indictment in the case at bar does not even state as a conclusion of law that

the offense of monopolizing was committed at any particular time. Giving the allegation the utmost effect, it avers that by the doing of a variety of acts at different times, the defendants have at some *unspecified* time committed the offense of monopolizing or attempting to monopolize. Certainly, it would require a repudiation of all the time-honored principles of criminal pleading to construe this into an averment that the offense was committed at some *particular time within the period of limitation*; for this would be to fritter away the constitutional provision that no person shall be held to answer except upon the indictment as it was found by the grand jury (*Ex parte Bain*, 121 U. S. 1), and it has been held repeatedly that this may not be done by process of construction. See p. 85 of our principal brief. The extent to which the court has discountenanced this doctrine is strikingly illustrated by the decision in *United States* v. *Simmons*, 96 U. S. 360, 363, which is discussed at page 87 of our principal brief.

The offense of monopolizing within three years prior to the finding of the indictment cannot be spelled out of this indictment, for that offense is not properly averred in any count. Mr. Justice Jackson as Circuit Judge in the case of *In re Greene*, 52 Fed. 104, 111, *discussing an indictment under the Sherman Act*, used the following language:

> "But the act does not undertake to define what constitutes a contract, combination or conspiracy in restraint of trade, and recourse must therefore be had to the common law for the proper definition of these general terms, and to ascertain whether the acts charged come within the statute. We regard it as well settled by the authorities that an indictment, following simply the language of the act, would be

wholly insufficient, for the reason that the words of the statute do not of themselves fully, directly, and clearly set forth all the elements necessary to constitute the offense intended to be punished. *U. S.* v. *Cruikshank*, 92 U. S. 542; *U. S.* v. *Simmonds*, 96 U. S. 360; *U. S.* v. *Caroll*, 105 U. S. 611; *U. S* v. *Britton*, 107 U. S. 655; 2 Sup. Ct. Rep. 512; *U. S.* v. *Trumbull*, 46 Fed. Rep. 755.

"Under the principle established by those cases, the several counts of the present indictment must be tested, not by the general recitals and averments thereof, although in the words of the statutes, but by the specific acts or particular facts, which are alleged to have been actually done and committed by the accused. If the particular acts or facts charged do not, as a matter of law, constitute contracts, combinations, or conspiracies in restraint of trade and commerce among the several states, or a monopoly or attempt to monopolize any part of such trade or commerce, no amount or averments and allegations that the accused 'engaged in a combination' or 'made contracts in restraint' of such trade or commerce, or 'monopolized' or 'attempted to monopolize' the same, will avail to sustain the indictment. Whether the accused is charged with an offense is to be determined by the particular acts or facts set forth, and not by the conclusions of the pleader, although asserted in the words of the statute: 'Every offense consists of certain acts done or omitted under certain circumstances, and in the indictment for the offense it is not sufficient to charge the accused generally with having committed the offense, but all the circumstances constituting the offense must be specially set forth.' *U. S.* v. *Cruikshank*, 92 U. S. 542, 563."

In order that the acts charged in an indictment shall suffice to establish the actual commission of the offense within the period of limitation, they must, of course, be such as, if proved, would warrant the jury in finding that the offense had been committed within that period. It is not enough that they charge an offense committed at a

prior period. To constitute a sufficient averment of the commission of the offenses within the period, there must be allegations of acts of monopoly within the period, or allegations that acts constituting a monopoly, which were previously performed, were continued within the period of the limitation.

The only acts alleged to have been performed at any time having a tendency to create a monopoly were (1) the making of the contract of December 30, 1903, whereby it was agreed that the control of the majority of the stock of the Pennsylvania Company should be vested in the American Company during the period of the agreement, and (2) the acts performed on the same day in pursuance of that contract. It nowhere appears in the indictment that the voting power upon the stock was ever exercised; it nowhere appears that the stock was ever transferred or the proxy renewed; it nowhere appears that the control of the board of directors was ever actually vested in the American Company, and it nowhere appears that the defendants carried out the purpose which is attributed to them of continuing their control of the 26,000 shares of stock beyond the period provided for in the contract. It is entirely consistent with every averment of the indictment that the control of the stock itself and of the voting power upon it, was returned to Mr. Segal long prior to July 1, 1906. The utmost that could be spelled out of the indictment by process of inference would be that the agreement of December 30, 1903, was continued in force for the time provided therein, namely, one year. Certainly, an allegation that it was intended by the defendants that they would extend the life of that agree-

ment by preventing Segal from complying with the conditions to be performed by him is not the equivalent of an allegation that they succeeded in carrying out their intention, or that Segal was not able to, and did not at or before the maturity of the loan, pay it off and repossess himself of the stock.

In the original brief filed on behalf of the government, there appears, at page 36, the statement that the proxy given Kissel to vote a majority of the stock of the Pennsylvania Company was "irrevocable." But it is to be noted that the proxy itself provided that it is to be "irrevocable" merely *pending the life of the agreement made on the same day* (rec. p. 10). Therefore, the right of the American Company to exercise voting power on the stock must be presumed to have come to an end at the latest in January, 1905, irrespective of the provisions of the Pennsylvania statute referred to in our original brief at page 98, and irrespective of the decisions of the Pennsylvania courts to the effect that the right to vote by proxy is not a common law right, and is to be exercised only in accordance with special authority (*Craig* v. *First Presbyterian Church*, 88 Pa. St. 42, 47 *Commonwealth* v. *Bringhurst*, 103 Pa. St. 134, 137), and irrespective of the authorities in Pennsylvania and elsewhere that a proxy coupled with an interest is none the less revocable under the provisions of a statute of this character. *Vanderbilt* v. *Bennett*, 6 Pa. Cy. Cts. Reps. 193, 203; *Matter of Germicide Co.*, 65 Hun 606.

As to the resolution of the board of directors in pursuance of the contract of December 30th, 1903, it is to be observed that it is nowhere alleged that that act was fol-

lowed by the actual closing of the refinery or suspension of business on the part of the Pennsylvania Company. However effective such resolution might be to establish an attempt to monopolize committed upon the day of its passage, namely, December 30th, 1903, the mere resolution could not constitute the substantive offense of monopolizing at any time and could not involve an attempt to monopolize at any period later than the date of its adoption. Moreover, it appears by the very terms of the resolution that it was subject to contrary order of the board at any time (rec. p. 11), and there is, of course, no principle of law or evidence upon which an act of this character, which is not in its nature continuing and which by its terms is subject to immediate termination, can be presumed in a criminal case to have continued for several years, or for any definite period. Furthermore, as we have already pointed out, there is no allegation in the indictment that the resolution was ever acted upon, or that it was in force as late as July 1, 1906, or that with or without its rescission the Pennsylvania Company did not engage in business in competition with the American Company long prior to July 1, 1906, or that during the period beginning July 1, 1906, the Pennsylvania Company was not in active competition with the American Company, or that the American Company or anybody acting for it, or in its behalf, or any of the defendants, did any act after July 1, 1906, to prevent the Pennsylvania Company from engaging in competition with it. The statement in the government's original brief (at pp. 36–37), that the resolution to close the refinery "continued unrevoked and effective" is nowhere to be found in the indictment. The allegations of

acts which occurred within the period beginning July 1, 1906, need only be examined to convince the court of the sheer absurdity of the contention that the indictment charges the commission of any act of monopoly or the continuance of a monopoly or an attempt to monopolize within the three years' period. The sufficiency of the indictment is to be tested "by the specific acts or particular facts, which are alleged to have been actually done and committed by the accused" within the period and "if the particular acts or facts charged do not, as a matter of law, constitute . . . a monopoly or attempt to monopolize any part of such trade or commerce, no amount of averments and allegations that the accused . . . . monopolized or attempted to monopolize the same, will avail to sustain the indictment." *United States* v. *Greene*, *supra*. The averment contained within the matters of inducement in the conspiracy count, that the Pennsylvania Company "throughout the remainder of said period would so have carried on said business, trade, and commerce, if it had not been for the unlawful and corrupt conduct . . . which is now to be described" (rec. p. 4), is a conclusion and plainly insufficient. According to the established principles of criminal pleading, facts must be averred, and they must be averred directly (see authorities in principal brief, p. 85). The allegation now before the court is not the equivalent of a direct averment that at any particular time subsequent to July 1, 1906, the Pennsylvania Company did not carry on its business, and certainly it cannot be held that it is the equivalent of a direct averment that throughout said period it did not do so. *United States* v. *Simmons*, 96 U. S. 360, 363.

And finally it is to be observed that the learned Assistant Attorney General has inadvertently been led to an over-statement of the contents of the indictment, and that throughout the supplemental brief will be found statements which the indictment itself will not bear out. For example, on page 35 of the supplemental brief on behalf of the United States, the following is urged upon the court:

> "Suppose, as is alleged, this company, by obtaining complete control of the Pennsylvania company in the manner alleged, acquired an entire monopoly of the sugar-refining business in the United States, and by the American company's still holding the control of the Pennsylvania company by virtue of the four directors who were elected at the instance of the American company, and who were subservient to its wishes, and by the order of such directors made December 30, 1903, remaining unrevoked, the Pennsylvania company was continuously kept out of business, and thereby the monopoly was continued in favor of the American company. Could it be doubted that at every moment such condition existed the American company was *monopolizing* the sugar business, just as much as it was the moment it first, by the method declared, shut down the operation of the Philadelphia refinery?"

As matter of fact, it is not alleged in the indictment that the American Company acquired an entire monopoly of the sugar-refining business in the United States; nor is it alleged that the control of the Pennsylvania Company by the American was continued by the election of four directors, or otherwise; nor is it alleged that four directors were elected at the instance of the American company who were to be subservient to its wishes; nor is it alleged that the order of *such* directors made December 30th, 1903, remained unrevoked, or that

the order by whomsoever made remained unrevoked; nor is it alleged that the Pennsylvania Company was continuously kept out of business; nor is it alleged that thereby the monopoly was continued in favor of the American Company; nor is it alleged that the operation of the Philadelphia refinery was shut down during *any* period whatever and, *a fortiori*, it is not alleged that it was shut down at any period subsequent to July 1, 1906. We may, therefore, appreciate the full import of the statement of the learned Assistant Attorney-General on the oral argument that the indictment might have been better drawn; but that view can hardly warrant or excuse the inclusion in his brief of facts not to be found in the record, which may, for all that appears, be entirely unfounded and contrary to the truth. As Chief Justice Marshall said in *United States* v. *Wilson*, 7 Pet. 150, 161:

> "The looseness which would be introduced into judicial proceedings, would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding, in ordinary cases, would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages."

Again, at page 37 of the supplemental brief, the statement will be found that "Kissel procured the election of the four directors who were subservient to the American company," although there is no allegation in the indictment that anything of the kind ever happened. It is then added on the same page that the order of the board of directors in which Kissel participated "put and held" the company out of competition with the American company, although this is without support of any statement in

the indictment. It is then further stated, on page 38, that "it is expressly averred in these several counts that this monopoly continued during the entire six years previous to the finding of the indictment," although, as stated above, the indictment contains neither any such express averment nor any averment that remotely implies or approximates it. So also, in the government's original brief, p. 10, it is suggested, if not asserted, that the Pennsylvania Company went into a receiver's hands on October 2, 1906, "as a natural result" of the defendants' conduct, though the only averment in the record is directly to the contrary. The special plea in bar of the defendant Kissel expressly alleges that he "was not a party to and did not participate in the said action or in said proceeding for the appointment of a receiver, and did not, directly or indirectly, procure, induce, counsel, advise, aid or abet the institution of the said action, the appointment of the said receiver, or the making of said orders, Exhibit A" (rec. p. 33). This was admitted by the demurrer of the United States.

II.

As to the conspiracy counts.

The government advances in its supplemental brief (p. 25), for the first time, the proposition that the Sherman Act is to be interpreted upon the assumption that to *engage in a conspiracy* under section 1 constitutes an offense entirely different from the offense *to conspire* under section 2, and that the former means to be engaged in consummating the object of a conspiracy as

distinguished from the act of joining in a conspiracy or of entering into an agreement or combination.

The verb "to conspire" frequently has been used by Congress in defining offenses of conspiracy; *e. g.*, sections 5440 and 5508, and it is firmly established that this consists of the agreement or plot or meeting of minds and not of any acts done in pursuance of the conspiracy. As the Circuit Court of Appeals, Sixth Circuit, said in *McKenna* v. *United States*, 127 Fed. 88, 90:

> "The gist of the offense defined by the statute is the conspiracy to do the wrongful thing, and not the doing it. Whatever the morality of the actual accomplishment of the purpose of the conspiracy may be, it is not the subject of indictment. The whole body of the crime constituted by this section consists in the formation of the plot."

In Wright's Criminal Conspiracies, page 124, it is said:

> "The conspiracy itself is the crime. It is different from an indictment for stealing, or an action for trespass, where the offense consists of an act done. The devising of means is not a constituent part of the offense, but an act done in pursuance of the original design. *It is not the actual perpetration but the original hatching of the plot which constitutes the offense.*"

See also our principal brief, p. 51 *et seq.*

When, therefore, Congress, used the verb "*to conspire*," it did so in the light of the long-settled rule of the federal courts and of the common law that the crime of conspiracy consisted of the act of agreeing, and that acts done while engaged in consummating or carrying into effect the object of the conspiracy were not a part of the offense. It is hardly reasonable to assume that the wording of section 1, namely, "engage in any such combination or conspiracy,"

was intended to create an entirely different crime, and to provide that the acts done to effect the object of the conspiracy should be the gist or essential element of the offense.

As was pointed out on the oral argument, by a question to the learned Assistant Attorney General, the interpretation advanced by the United States might make the Sherman Act read as if it punished only those who were actually engaged in carrying into effect the object of a conspiracy, and did not punish those who had only agreed to the plot or conspiracy, but had done no overt act. In the government's original brief it is asserted (p. 51) that "the Sherman Act makes a conspiracy in restraint of commerce or to monopolize commerce an offense without the occurrence of even a single overt act." Yet in the supplemental brief (see p. 25) it is contended that Congress contemplated by the words "who shall engage in any such conspiracy" to strike at and punish not the hatching of the plot but the overt acts done in pursuance of it.

Under section 1 of the Sherman Act, the offense is *to make* an agreement or *to engage* in a combination or conspiracy. Congress undoubtedly used the active verbs "to make" and "to engage" in the same general sense, that is, as implying action, just as the verb "to conspire" is an active verb implying action, that is, to plot, to scheme, to join in, to concur. A different thought and a different question would be presented if, instead of using the active form "who shall engage," Congress had used the neuter form "who shall be engaged in" a conspiracy.

When it is said that "a man engages in business," we mean the act of commencing or starting in business as

distinguished from being actually engaged in or carrying on business. When we say that a nation engages in war, we mean that it starts, enters upon, or begins war—a conception entirely different from that expressed by the neuter form that a nation is engaged in war. Again, when we say that a man engages in a copartnership, we mean that he forms or enters into a copartnership, and not that he is engaged in, or is a member of, a copartnership.

It is difficult to conceive that Congress, in prohibiting conspiracies in restraint of trade by section 1 of the Sherman Act, intended to create a kind of conspiracy differing essentially in character from the kind of conspiracy forbidden in section 2. Likewise it is difficult to conceive that Congress, by the use of the words "engage in a conspiracy" in the first section intended to create a continuous crime consisting of the state of "being engaged in" a conspiracy to restrain trade, a crime essentially different in character from the common law crime of conspiracy, while intending by the use of the word "conspire" in the second section to create a conspiracy of the character known to the common law and consisting only of the act of entering into an unlawful combination. It is submitted that there could be no reason for thus creating criminal conspiracies differing essentially as to character, elements and constitution, and that it is apparent upon a reading of the two sections that Congress intended only to create three kinds of crimes, namely, the two substantive crimes of monopolizing and attempting to monopolize, and the crime of conspiring as known to the common law. If Congress had intended by the use of the words "engage in a conspiracy" to provide for elements

of offense wholly different from those of any conspiracy to be found in federal legislation, or indeed in any state legislation, language would have been used definitely expressing this novel idea, so as to indicate plainly that it intended to punish not merely the act of plotting, but the state or condition of being engaged in a conspiracy and doing acts to effect its object.

As to the nature of the offense of conspiracy, it may be added that the following propositions are fully and firmly established by the authorities cited in our principal brief: (1) that a conspiracy is the agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means, and that the crime consists, not of a state or condition of mind or of mere intention, but of the act of agreeing; (2) that whenever and wherever that act is performed or renewed, the crime is committed; (3) that the fact that the same parties have antecedently made a similar agreement to effect the same object renders the new agreement none the less a new offense; (4) that the act of agreeing is ordinarily established circumstantially by proof of concurrent acts, and from this proof the making of the agreement may be deduced; (5) that the ultimate fact to be found by the jury is the making of the agreement, and it is that act, and not the acts from which the agreement is deduced, that constitutes the offense, and (6) that the statute begins to run in conspiracy, as in every other crime, from the date when the offense is actually completed.

A continuous crime is one that contemplates duration, lapse of time, or course of conduct however short or long, and this fact of duration is an essential element of the

offense and constitutes the gist or gravamen of the offense. A non-continuous offense, however, is one that may be committed without perceptible lapse of time, and in which the essential act constituting the gist or gravamen of the offense may be performed by one act, such as agreeing, or, as the scholars put it, that may be committed at one stroke, in one breath, *uno ictu*, *uno flatu*.

Familiar examples of continuous, as distinguished from non-continuous offenses, will be found in the offenses of cohabitation as distinguished from bigamy, of maintaining a nuisance as distinguished from erecting a nuisance, of carrying on business without a license as distinguished from selling without a license, of keeping a gambling house as distinguished from gambling. As Mr. Justice Blatchford said in the case of *In re Snow*, 120 U. S. 274, 281, speaking of the offense of unlawful cohabitation:

> "It is, inherently, a continuous offense, having duration; and not an offense consisting of an isolated act."

An indictment for crime should lay the offense as actually committed within the limitation and in conspiracy cases should allege the conspiracy as having been found or entered into within the limitation. It involves a misconception of the law, and, hence, it is bad pleading to charge in an omnibus indictment a number of different conspiracies committed at different times under the guise of a single continuing offense. *Commonwealth* v. *Bartilson*, 85 Pa. St. 482, 486; *United States* v. *Biggs*, 157 Fed. 264.

In the recent *Barber* case (No. 444), the government adopted the view that each overt act in furtherance of

a conspiracy constitutes a new offense (see supplemental brief in that case, pp. 58–60), though it declines to accept the consequences of that doctrine, and has called attention to certain of the attributes of conspiracy which it conceives to be inconsistent with the view that a renewal of the conspiracy constitutes a separate offense and not the continuance of the old offense. Thus, upon the argument of the case at bar, it was asserted by the learned Assistant Attorney General that a conspiracy might be prosecuted wherever an overt act was committed. The authorities, however, show that a conspiracy is indictable where an overt act is performed, not upon the ground that the overt act was *in furtherance of an antecedent conspiracy*, but solely on the ground that the overt act is evidence of the commission of the crime of conspiring within the jurisdiction. The authorities are quite clear that it is the crime actually committed in the new jurisdiction that is the subject of prosecution, and not the antecedent crime of conspiracy committed elsewhere and transferred to that jurisdiction through the performance of an overt act.

Thus, in *Noyes* v. *The State*, 41 N. J. L. 418, where it was held that although the conspiracy had originally been formed in New York, an indictment would lie for a conspiracy to the same end in New Jersey, the jurisdiction of New Jersey was sustained only because the acts done in New Jersey by the *defendant Noyes* were done with the co-operation of a co-conspirator acting through innocent agents in New Jersey. The court said (p. 424):

> "By the application of this established rule, it appears impossible to avoid the result that, as an in-

> tendment of law, the act of changing the possession of this property from the company to the defendant, Noyes, was the *joint act* of such defendant, and of Mr. Stedwell, who is also a defendant, and that by such joint act the conspiracy was *renewed* and partly executed in this state, in the county of Essex, and . . . thus *this* crime became cognizable by the courts of that locality."

The same reasoning seems to have controlled the court in *Commonwealth* v. *Corlies*, 3 Brewster 575, 577, in which it appears that the jury was instructed that, in order to convict, they must find that there was a conspiracy formed within the jurisdiction between two or more persons, or they must acquit the defendant.

In *King* v. *Brisac*, 4 East 164, which is probably the case most frequently cited with regard to the jurisdiction to prosecute at the place where an overt act is performed, the court discussed a prior unreported case of *King* v. *Bowes and ors.*, in which it had been held that though the acts of some of the conspirators were confined to other counties than Middlesex, the conspiracy might be prosecuted in that county by reason of the fact that acts had been done by the conspirators on trial in the prosecution of the conspiracy in that county; but the court held specifically that it was not necessary to adopt even that view for the purposes of the case before it, since the defendants had committed a substantive offense within the county.

The principle is made clear by the decision in the case of *People* v. *Mather*, 4 Wend. 229. As has been pointed out in our original brief (at pp. 77, 78), the indictment in that case was for the renewal of a conspiracy in a different county from that in which the plot had originally been hatched, and it charged a new offense

in that county at the time of the renewal. The reasoning of the case is consistent only with the theory of renewability by *acts* done within the jurisdiction where the *venue* is laid.

Moreover, it must be manifest that conspiracies, under the statutes of the United States, may not be prosecuted in a jurisdiction where an overt act was performed unless the conspiracy was also formed in that district. By the unbroken line of authorities hitherto referred to (see pp. 52–53 of our original brief), it is established that the overt act performed in pursuance of a criminal conspiracy constitutes no part of the offense; and the Constitution forbids that a crime be prosecuted save in the district or districts in which it is committed. Hence, it would be clearly violative of constitutional rights to prosecute in a district other than that in which the conspiracy was formed, simply because an overt act was performed in that other district.

But while this constitutional provision forbids that a conspiracy be prosecuted in a district other than that in which it was formed upon the basis of the performance of an overt act in the other district, it does not forbid prosecution in that other district of any conspiracy formed or renewed to further the same end as the antecedent one. Therefore, when a corrupt agreement has been entered into in one district, and subsequently one or more of the parties to that agreement participate in an act in another district, and there is thus evidence to support the conclusion that in that new district they have again conspired, this act of conspiring may be prosecuted in that new district. In such case, however, the indictment must be founded upon a conspiracy formed in the new district.

In *Hyde* v. *Shine*, 199 U. S. 62, 76, the question as to the right to prosecute a conspiracy in the district in which the overt act was performed, although the defendants were not there at the time, was a subject of discussion, but the prevailing opinion dismissed the point with the statement—

> "As the indictment in this case charges that the conspiracy was entered into in the city of Washington, it becomes unnecessary to consider whether an indictment will lie within the jurisdiction where the overt act was committed, though there are many authorities to that effect."

The dissenting opinion filed by Mr. Justice Peckham, with the concurrence of Mr. Justice White and Mr. Justice McKenna, states the following (p. 85):

> "The indictment avers that the conspiracy was entered into in Washington, District of Columbia, on December 30, 1901, *and the opinion holds, in substance* (*and rightly, as I think*), *that it is essential to aver its formation in the District in order to give the courts therein jurisdiction of the offense.*"

And further that (p. 87):

> "If defendants were not then there," (in the district where the conspiracy was formed at the time of its formation), "they could not be guilty of the crime charged in the indictment."

The learned Assistant Attorney General has also invoked the rule of evidence that when a conspiracy is established the acts of each of the conspirators become the acts of all, and he has argued that this rule is inconsistent with the doctrine that conspiracy is an instantaneous and not a continuing offense. This argument, as we think, misconceives the purpose and scope of the rule which it invokes. The formation and nature of the agree-

ment may be proved in a criminal case through the character of the concurrent acts, and, in consequence, evidence of those acts is admissible to establish the formation of the conspiracy just as similar evidence is admissible to prove the participation of two or more persons as principals or accessories in the commission of any other offense. The evidence is admitted in accordance with the ordinary rules applicable to the proof of an ultimate fact through other facts, and the rule invoked is a mere commonplace of the law of evidence applicable to criminal cases. In civil cases, however, where actual damage is of the gist or gravamen of the cause of action, the acts of any conspirator are admissible, after due proof of the conspiracy, to prove the injury actually done and the damage sustained.

The rule that, after the conspiracy is proved, the act of each conspirator is the act of all, is merely the rule of agency which is applicable to the prosecution of substantive offenses committed jointly by several confederates, and relates to prosecutions for the substantive offenses which may be the object of a conspiracy rather than to prosecution for the crime of conspiring. For, in conspiracy, it is immaterial whether any acts subsequent to the agreement are performed and, hence, it is immaterial to the determination of their criminal responsibility for the conspiracy, whether those who do not perform any acts in furtherance of the agreement are responsible for the acts performed by others.

III.

As to the sufficiency of the pleas.

It seems to be the contention of the government that if the pleas in bar now before the court had simply set up the defense of the limitation in the language of the statute and had stopped there, the pleas would have been good; but that they were vitiated and turned into pleas of the general issue simply because the averment that the offenses charged in the indictment had not been committed within the three years was supplemented by allegations that the alleged overt acts were not done to effect the object of the original conspiracy. It must be obvious that if it is now to be declared as law that the allegation of time or the allegation that overt acts were done by one or more of the alleged conspirators *in order to effect the object of the conspiracy* could not be traversed by a plea in bar, an accused could readily and always be deprived of the right to plead in bar in conspiracy cases, and thus this substantial and vital privilege would be frittered away and nullified by the mere device or artifice of making averments in the indictment which the prosecution would not have to prove at all, by which it would not in any sense or way be held or bound, and which it could wholly repudiate or disregard on the trial as mere surplusage. See Starkie's Crim. Plead. quoted *supra*.

As shown in our original brief, the allegations of overt acts and of time are immaterial. They constitute no essential part of the indictment, and a denial of such allegations does not vitiate a plea in bar otherwise good or create or tender any real issue. Such a denial cannot in

effect transform a plea setting up solely the defense of the limitation into the equivalent of a plea of not guilty.

In order to save this indictment, the government asks the court to disregard or abrogate the ordinary rules of pleading in conspiracy cases, and to treat this case as exceptional. Thus, it is asserted on page 25 of the supplemental brief as follows:

> "The feature of these counts which is especially important, and to which the court's attention is particularly called, is that the offense charged in each count is *not the formation* of a conspiracy, *but the engaging in the conspiracy described* for the purposes alleged, by the doing of the particular acts described. The overt acts set forth do not bear the same relation to the offenses for which defendants are here indicted, as such acts do to an ordinary conspiracy. They are here alleged as constituting elements of the offense, and not as incidents growing out out of the offense of conspiring; that is, it was by and in the commission of these several acts that defendants engaged in the conspiracy."

But at page 42 of the supplemental brief, the government asserts in one paragraph that "it is unnecessary to set forth in the indictment any overt act; and that in case such acts are alleged, it is equally unnecessary that they be proved, and that they may be treated as surplusage," and in another paragraph it asserts that "it necessarily follows as a corollary of this principle that the essential allegations of the indictment may be supported by proof of overt acts entirely independent of and different from those which are particularly set forth in the indictment, and consequently, that in making out the offense charged in the present indictment

against Kissel and Harned, the Government cannot be confined to proof of the particular facts alleged as overt acts, but may prove any specific acts in addition thereto or independent thereof."

Thus, the government in one breath (p. 25) urges that the allegations of overt acts are to be treated as essential elements of the offense for the purpose of depriving the accused of the right to plead in bar, and in another breath (p. 42) insists that they may be treated as mere surplusage for the purpose of conviction on the merits. Such a contention need only be appreciated to refute itself.

The suggestion is made in one form or another that the court below treated the pleas as demurrers and held that the indictment was fatally defective. As the United States had demurred to the plea, the settled rule of pleading (original brief, p. 15) that a demurrer searches the whole record and seeks the first error became applicable. But, as matter of fact, the court did not hold the indictment bad on its face as not charging the commission of any offenses under the Sherman Act. All that the court held was that it did not appear on the record before it that any of the alleged offenses had been actually committed within the three years before the finding of the indictment. The United States by its demurrer submitted to the court the question whether, on the face of the pleadings, it appeared that the offenses had been committed within the three years. The attempt to limit and confine a plea in bar to the function of a demurrer disregards the fundamental difference between a special plea and a demurrer, and would wholly remove

any necessity for such a plea. The reason why pleas are allowed is that they present facts which do not properly appear on the face of an indictment or declaration, or which involve matters not necessary to be alleged by way of anticipation. Thus, in *United States* v. *Cook*, 17 Wall. 168, 179, the court held that the defense of the limitation could not be availed of under a demurrer, although it might appear on the face of the indictment that more than three years had elapsed since the commission of the offense, for the reason that it might well be that the statute of limitations did not apply because the accused had been a fugitive from justice, and that the prosecution ought, therefore, to have the opportunity to show that fact. The filing of a special plea in bar instead of a demurrer gave the government the fullest opportunity to show that the accused came within the exception. The government now urges that to allow the plea to be treated as a demurrer to the indictment would be to circumvent the rule declared in the *Cook* case and thus to do indirectly what could not be done directly. But the reason of the rule does not apply in the case at bar. The defendants duly set forth in their pleas that they had not been fugitives from justice (rec. pp. 34 and 53); and the United States by admitting this allegation instead of filing a replication elected to submit to the court the question of law whether it did or did not appear on the whole record that the offenses were committed within three years. The government had the right to show every fact not alleged in the pleas and advisedly waived that right. How then can it seriously claim that it was deprived of the right secured to it under the rule in the *Cook* case?

As the special pleas in bar presented the single issue and the single defense of the limitation, they are sufficient in law for that purpose, and are not vitiated or rendered equivalent to the general issue by the additional averments. *Patchen* v. *Sprague*, 2 Johns. 462, 466.

CONCLUSION.

It is, therefore, submitted that whether the several offenses charged in this indictment be regarded as continuous or non-continuous, the court below did not err in holding that the pleas were sufficient in law to present the single defense of the limitation, in overruling the demurrer and in awarding judgment accordingly, in the absence of any request on the part of the government that it desired to plead over; that no other judgment could have been properly directed as the United States remained silent and stood on its demurrer; that the court was not called upon to ask the government if it did not desire to do something else or different, and that in criminal cases, on an appeal of the government, a trial court awarding judgment in favor of the individual ought not to be reversed unless it has committed error. Of course, there can be no error committed in not granting what was not asked for. As the Circuit Court of Appeals, Ninth Circuit, recently said on a criminal appeal in the case of *Jones* v. *United States*, 179 Fed. 584, 592:

> "In an action at law this court is limited to the correction of the errors of the court below. Questions which were not presented to or decided by that

court are not open for review here because the trial court cannot be guilty of error in a ruling that it has never made upon an issue to which its attention was never called."

Washington, D. C., November 17, 1910.

JOSEPH H. CHOATE,
WILLIAM D. GUTHRIE,
HOWARD S. GANS,
WILLIAM C. OSBORN,
LEAVITT J. HUNT,
Of counsel for defendants in error.

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Supreme Court of the United States,

OCTOBER TERM, 1910.

No. 390.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

GUSTAV E. KISSEL AND THOMAS B. HARNED.

BRIEF SUBMITTED BY LEAVE OF THE COURT ON BEHALF OF MESSRS. THOMAS, DONNER, SENFF, MAYER AND FRAZIER WHO ARE JOINED WITH MESSRS. KISSEL AND HARNED AS DEFENDANTS IN THIS PROSECUTION.

JOSEPH H. CHOATE,
DE LANCEY NICOLL,
JOHN M. BOWERS,
JOHN D. LINDSAY,
Of Counsel.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

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I.

BY ITS OWN ALLEGATIONS THE INDICTMENT SHOWS THAT THE CONSPIRACY THEREIN DESCRIBED COULD NOT HAVE BEEN IN EXISTENCE AT ANY TIME WITHIN THREE YEARS BEFORE THE INDICTMENT WAS FOUND, ITS OBJECT HAVING BEEN FULLY CONSUMMATED IN DECEMBER, 1903, WHEN, IN CONSEQUENCE OF THE DEFENDANTS' CONDUCT, THE PENNSYLVANIA COMPANY WAS PREVENTED FROM ENGAGING IN THE SUGAR TRADE.

The indictment alleges that the defendants "have engaged" in the conspiracy therein described on the 30th day of December, 1903, "and continuously, and at all times during said period of six years, *to wit*, from that day until, and on, the day of the finding and presentation of this indictment" (Record, p. 5).

The Government seeks to treat the *continuando* as, in effect, an allegation that the conspiracy formed on De-

cember 30, 1903, "was never abandoned, but was in continuous operation thereafter" (United States *v.* Brace, 149 Fed. Rep., 874, 876), and thus ignores the established rule of pleading, that if a crime is non-continuous a *continuando* will not extend its duration (United States *vs.* Irvine, 98 U. S., 450), and is to be rejected as "insensible and surplusage" (Story, *J.*, in United States *v.* La Coste, 2 Mason, 129, 140).

The rule thus ignored, of itself disposes of the Government's contention that conspiracy is a continuing crime. For a crime is continuing only when the act which constitutes its essential element is of a continuous nature. In conspiracy this act is the act of agreeing, and the act of agreeing is as inherently a non-continuing one as the act which constitutes the offense in assault, or arson, or larceny, and continuance is no more to be attributed to it than to the acts which constitute those offenses.

But it is of no legal consequence whether the *continuando* be retained or rejected, for when we examine the averments which describe the scope and purpose of the agreement of December 30, 1903, it becomes at once apparent that that agreement *could not have been in existence at any time within the statutory period*, because by its terms (1) its purpose would have been, and, indeed, is distinctly alleged to have been, *fully accomplished more than five years before this prosecution was begun*, and (2) *it contemplated no further action within that period.*

(*a*) The Pennsylvania Company was not engaged in business at the time the conspiracy was formed, *nor at any time.* This appears affirmatively, for the indictment alleges, in terms, that the company was organized and created and has existed throughout "said period of six years" "for the *purpose* of carrying on business," that on December 30, 1903, it was *"about to,"* and *"intended to"* engage in and carry on "business," and that it *"would have"* done so "if it had not been for the unlawful and corrupt conduct of the" (defendants) "which is now to be described" (Record, p. 4). This is certainly equivalent to a direct averment that the conduct of the defendants resulted in the Pennsylvania Company's exclusion from the sugar trade *at that time.*

The indictment thereupon proceeds to describe the conduct, but for which the company would have be-

come a competitor of the American Company, namely, that the defendants conspired "unreasonably to restrain and eliminate free competition" between the Pennsylvania and American companies *"by and through the* unfair, deceitful, unlawful and corrupt *means and practices* on the part of said corporation and individual defendants, *which are now here described"* (*Id.*, p. 5):

These means and practices are thus "described":

1. The defendants were "to get . . . for said corporation defendant, the possession, use and control of, and the authority to vote" a majority of the Pennsylvania shares, "and thereby secure the *power of control* over and management of" that company "for the term of one year at least," by inducing Segal to borrow from Kissel, the latter acting as a broker, and as the agent of an undisclosed principal, the sum of $1,250,000 *for the term of one year from January 4, 1904*, at six per cent. interest, and to transfer to Kissel, with other security for the repayment of the loan, written authority to exercise the power of voting as a holder of said . . . shares . . . without said Adolph Segal being aware of the fact that said corporation would be the real lender," etc. (*Id.*, pp. 5-6).

2. "*When the power of control over and management* of" the Pennsylvania Company *"should be so acquired* by said defendant corporation *for the term of one year* in the manner aforesaid, said . . . defendants were to use every means in their power to extend said term and said power of control, particularly by keeping said Adolph Segal involved in debt, and his affairs in such a condition as to prevent his relieving himself from his obligations to said corporation, and by wrongfully and arbitrarily refusing to accept payment of such obligations from him, either before or at their maturity, or to surrender to him such power of control over and management of said Pennsylvania Sugar Refining Company" (*Id.*, p. 6).

3. *When such power should be so acquired*, the defendants were *"to make use of the same"* to prevent the Pennsylvania Company from engaging in or carrying on business, and "thereby *to bring about the ruin of said Pennsylvania Sugar Refining Company* through inaction,

and the destruction of its said property and facilities through decay, and *eliminate and entirely prevent the competition* with said corporation defendant which would, but for the acts of said corporation and individual defendants in the premises, come into existence through the operation of said Pennsylvania Sugar Refining Company (*Id.*).

It thus appears that the objects of the conspiracy were:

1. To acquire, by means of the loan transaction, the power of control over and management of the Pennsylvania Company for the term of at least one year from the 4th day of January, 1904.

2. *When such power of control should be so acquired "for the term of one year"* "to use every means in their power to extend said term and said power of control," particularly by keeping Segal involved in debt, and by arbitrarily refusing to accept payment of his obligations "either *before or at their maturity.*"

3. Furthermore, to make use of such control, *when it had been so acquired*, to prevent the Pennsylvania Company from carrying on business, and thereby bring about its ruin through inaction, and the destruction of its property and facilities through decay, and thus eliminate the competition which would otherwise have come into existence.

The first step toward the accomplishment of the alleged agreement, namely, the acquisition of the power of control over and management of the Pennsylvania Company for the term of "one year at least," was to be taken on the 4th day of January, 1904, and it is expressly averred that all of the other contemplated acts were to be committed *when such power of control . . . should be so acquired* (p. 6).

It is obvious that the word "when" is here used in its grammatical sense as an adverb of time, meaning "at the time that," or "as soon as" (City of St. Louis *v.* Withans, 90 Mo., 646; Ware *v.* Lippincott, 10 Atl. Rep., 163; Williams *v.* Washington L. I. Co., 31 Iowa, 541, 544; Strawick *v.* Munhall, 139 Pa., 163). "When" and "upon," referring to the time of performing an act, are substan-

tially synonymous (Womrath *v.* McCormick, 51 Pa. St., 504, 507).

(*b*) The Government asserts that the indictment "charges *explicitly* that the conspiracy had a continuing object, viz., not merely to put the Pennsylvania Company momentarily out of business, . . . but to keep it out of business . . . *permanently*, or, at any rate, as long as possible" (Brief for the United States, p. 33), and in support of this assertion the Government calls attention to the allegation of the Second of the three paragraphs which undertake to describe the scope and purpose of the conspiracy, to the effect that when the defendants had obtained control of the Pennsylvania Company they "were to use every means in their power to *extend said term and said power of control*," &c. But it will be observed that the particular means, and the only means, by which the defendants are alleged to have intended to effect this result are thus specified: (*a*) "by keeping said Segal involved in debt and his affairs in such a condition as to prevent his relieving himself from his *obligations* to said corporation defendant, and" (*b*) "by wrongfully and arbitrarily refusing to accept payment of *such obligations* from him either *before or at* their maturity, or to surrender to him such power of control over and management of said Pennsylvania Sugar Refining Company" (Record, p. 6).

"This," it is argued, "is a charge that the conscious object of the conspiracy was to continue the subjection of the Pennsylvania Company . . . as long as possible."

There are, however, several serious objections to this conclusion. In the first place, we have only to turn to the First Paragraph to see that what are referred to as Segal's "obligations" in the passage above quoted were merely his obligations to pay the principal and interest on his original loan; and since these obligations were to mature on the 4th day of January, 1905, it is plain that any action on the part of the defendants, either to prevent him from meeting these obligations, or in respect of a refusal to accept payment, must take place, as indeed the indictment expressly alleges of the latter, "before or at their maturity," namely, on or before January 4, 1905.

In the second place, a charge of crime must be made directly, and not by implication. Every ingredient must be stated with certainty and precision. Nothing can be taken by inference or intendment (United States *v.* Hess, 124 U. S., 483; Ledbetter *v.* United States, 170 U. S., 606).

In the third place, it is distinctly alleged that the defendants were to make use of their power of control to prevent the Pennsylvania Company from carrying on business *when* that power was acquired. Whatever they might have contemplated doing *after that time,* in the way of keeping Segal involved in debt, or of wrongfully refusing to accept payment from him, however immoral or even illegal under the Pennsylvania or New York laws, would not, in itself, have constituted any violation of the Sherman Act, the Pennsylvania Company being already wholly eliminated as a potential rival of the American Company.

(*c*) But, the Government persists, even though there are no *direct* allegations of a continuing conspiracy, what *is* averred is *equivalent* to "a charge that the conscious object of the conspiracy was *to continue the subjection of the Pennsylvania Company to the American Company as long as possible*"; what the language of the indictment really "*means*," is "that defendants intended and mutually understood that they would keep the Pennsylvania Company out of business," etc. "Indeed," they argue, "any purpose on the part of the conspirators to keep the Pennsylvania Company out of business and competition merely for a moment, and not continuously, would be absurd. It would accomplish none of the *objects which are charged to have been sought.*" (Brief for the United States, p. 35).

These are, however, the only *objects* with which we are concerned, and there is no allegation that the objects so *charged* were to be continued, much less that any *act* toward their accomplishment was to have been committed, at any time within at least five years before the beginning of this prosecution. The exclusion of the Pennsylvania Company from business, and its consequent ruin, were to be brought about *when* the defendants obtained control, and *that,* as we have seen, is alleged to have been *done at the time it was intended to be done;* and whatever, if any-

thing, there was to be done after that, in the way of preventing Segal's recovery of his control, in no way affected the fact that the conspiracy had long before been fully consummated.

(*d*) If this agreement of December 30, 1903, constituted a violation of the Sherman Act, the offense would have been no greater, and no less, whatever its purpose as to the length of time during which the status thus to be created should continue. The defendants' failure to restore the pre-existing condition subjected them to no criminal liability. Omissions, however morally reprehensible, unless they constitute a defect in the discharge of a legal obligation, cannot be made the basis of penal action without unduly enlarging the range of the criminal law (Wharton, C. L., *10th ed.* Sec. 130). There cannot be a "negligent conspiracy" (Id., Sec. 1341).

(*e*) But, even if this were not so, since the indictment does *not allege* any purpose to continue such status, it cannot now be reconstructed by reading into it averments which are not there.

An accused person can only be tried upon the indictment as found by the Grand Jury, "and especially upon *all its language found in the charging part* of that indictment. If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the Grand Jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury as a prerequisite to a prisoner's trial for a crime, and without which the constitution says, 'no person shall be held to answer,' may be frittered away until its value is almost destroyed." (Mr. Justice Miller in *Ex parte* Bain, 121 U. S., 1, 10.)

(*f*) To enable the Court to determine that a conspiracy existed within a given period, it must appear from the indictment, without going further, that the unlawful agreement contemplated the commission of acts within that period (United States *v.* Cruikshank, 92 U. S., 542, 559). It is not enough that the conspiracy *might* have been extended into that period. If it is "*consistent with the averments*" that there was no such purpose *at*

the time of the agreement, it must be assumed that no such purpose then existed (United States *v.* Simmons, 96 U. S., 360, 363).

(*g*) Let us suppose that the framer of this indictment, instead of charging the agreement as a *continuing* one, originally entered into on the 30th day of December, 1903, etc., had alleged that the defendants on July 1st, 1909, conspired to do, by the same means and practices, precisely what is set forth in the indictment in its present form.

It would certainly be quite apparent upon the face of such an indictment, that it charged an utterly impossible thing, because it would charge a plan in 1909 to accomplish what had been already completely effected in 1903. Yet the very first contention urged in support of this prosecution is that the alleged conspiracy of December 30, 1903, is *charged* "as an existing agreement or conspiracy up to the filing of the indictment on July 1, 1909," which is precisely the same thing.

II.

IF THE OVERT ACTS BE TAKEN INTO CONSIDERATION, IT IS EQUALLY CLEAR THAT THE ALLEGED CONSPIRACY WAS FULLY CONSUMMATED MORE THAN FIVE YEARS BEFORE THE INDICTMENT WAS FOUND.

We have thus far ignored the allegations which charge the commission of overt acts, because, since the Sherman Law makes a conspiracy in restraint of trade an offense without the occurrence of even a single act other than the act of conspiracy, these allegations might be rejected as surplusage.

Such subsequent acts being no part of the offense (Dealy *v.* United States, 152 U. S., 539, 546; United States *v.* Britton, 108 U. S., 199, 205), the averments by which they are unnecessarily set forth are "but surplusage" (Hazen *v.* Com., 23 Pa. St., 355, 363), and hence cannot be resorted to for the purpose of determining *when* the offense, if any, was in fact committed, or for any other purpose.

The Court below, however, construed the indictment with reference to *all* of its averments, including these acts. The result of this construction is well stated in the opinion delivered by the learned District Judge. He said:

"The indictment alleges, in substance, that the defendants *conspired to prevent the Pennsylvania Sugar Refining Company from doing business.* It is alleged that *this result was accomplished;* that the defendant Kissel, acting secretly as agent of The American Sugar Refining Company, made a contract to loan to Adolph Segal $1,250,000 upon a note of Segal's, secured by certain collateral, among which collateral were 26,000 shares, being a majority of the stock of the Pennsylvania Sugar Refining Company; that having thus obtained such majority of the stock, a new board of directors, in the interest of The American Sugar Refining Company, was elected; that said board immediately voted to close the refinery of the Pennsylvania Sugar Refining Company; and *that it has since done no business*" (Record, pp. 56-7).

III.

EVEN THOUGH THE AGREEMENT DESCRIBED IN THE INDICTMENT HAD IN FACT CONTEMPLATED ACTION WITHIN THE THREE YEARS IMMEDIATELY PRECEDING THE FINDING OF THE INDICTMENT, THE OFFENSE WOULD NEVERTHELESS BE BARRED, EXCEPT AS TO SUCH OF THE PARTIES THERETO AS WERE SHOWN TO HAVE COMMITTED, WITHIN THAT PERIOD, ACTS TENDING TO EFFECT ITS PURPOSE.

The Government's proposition that a conspiracy is a continuing crime, and is in process of commission so long as the unlawful agreement *exists*, whether or not it is supplemented by overt acts, is not only unsupported by authority, but is repugnant to the fundamental principles of criminal jurisprudence.

(*a*) Acts and deeds are the subject of human laws, not thoughts and intents, unless accompanied by acts. The State does not suffer from "the mere imaginings of men. To entitle it to complain, therefore, some *act* must have followed the unlawful thought" (Bishop, New Cr. L., Sec. 204). "An *act* and evil intent must combine to constitute in law a crime" (*Id.*, Sec., 206). The law of conspiracy forms no exception to the rule, which is universal and applies to all crimes of every grade and character. It is the intent to conspire, coupled with the "*act* of conspiracy," which constitutes the offense (United States *v.* Hirsch, 100 U. S., 32, 34). "It is not a mental

offense; it does not consist in intents and imaginings. It exists where there are no overt *acts other than the agreement*" (People *v.* Mather, 4 Wend., 229, 264). "A conspiracy consists not merely in the intention of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable, if for a criminal object or for the use of criminal means." (Willes, *J.*, in Mulcahy *v.* Queen, L. R., 3 House of Lord, 306, 317). Therefore to punish a conspiracy where the end is not accomplished is not to punish a mere intention. The law strikes at the "first *manifestation* of the intent" (United States *v.* Cole, 5 McLean, 513, 516). "It is not the bare intention that the law punishes, but the *act of conspiring*, which is made a substantive offense, by the nature of the object intended to be effected. And in that respect, conspiracies are analogous to unlawful assemblies. . . . In that case it is not the bare *unexecuted intention* which the law punishes, but the *act of meeting*, connected with the *object* of that meeting, which constitutes the offense; and for that *act of meeting* alone, though it should be to do, what if actually done by one (as the pulling down of another's enclosures), would be but a civil trespass, the parties are liable to be punished by fine and imprisonment." (State *v.* Buchanan, 5 Har. & J. [Md.], 317, 355.) The Sherman Act is "not directed against a state of mind, but against a state of *facts*" (United States *v.* MacAndrews & Forbes Co., 149 Fed. Rep., 823, 830-1).

(*b*) Where the criminal agreement remains in force an indictment may nevertheless be sustained as to any *joint act* done in its furtherance within the statutory period, although three years have elapsed since the formation of the conspiracy, because by the commission of such joint act the parties to it repeat and enter anew into the original agreement. But the parties who participate in such *acts* are punishable for the new agreement only, not for the old one, the prosecution of which is barred by the statute as completely as though it had never existed. Indeed, in such a case the proper practice requires the time of the offence to be laid

on a specific day within the statute (Ware *v.* United States, 154 Fed. Rep., 578; United States *v.* Jones, 162 Fed. Rep., 417; Jones *v.* United States, 173 Fed. Rep., 584, 610; United States *v.* Greene, 100 Fed. Rep., 941, 946; 115 Fed. Rep., 349, 350; 146 Fed. Rep., 803, 888; *Ex parte* Black, 147 Fed. Rep., 838; affd. 160 Fed. Rep., 131; Lorenz *v.* United States, 24 App. D. C., 47, 337; United States *v.* Barber, 157 Fed. Rep., 899, 890; Ochs *v.* People, 25 Ill. App., 379; affd. 124; Ill., 399; Com. *v.* Bartilson, 85 Pa. St., 482, 486).

(*c*) If the Government's theory be sound the parties to an unexecuted conspiracy entered into twenty years ago may be prosecuted to-day, provided only the conspiracy, when entered into, contemplated acts which *might* still be committed, though none had been. If this be so, then have we truly a new doctrine of criminal law, by which, contrary to all previous conceptions, men, though immune for their deeds, are punishable for their "intents and imaginings."

IV.

NONE OF THE OVERT ACTS WHICH ARE CHARGED TO HAVE BEEN COMMITTED WITHIN THE PERIOD OF LIMITATION IS ALLEGED TO HAVE EFFECTED A RENEWAL OF THE AGREEMENT OF 1903; NOR IS THERE ANY AVERMENT FROM WHICH THE COURT CAN SEE THAT ANY OF THEM MIGHT HAVE OPERATED, DIRECTLY OR INDIRECTLY, TO RENEW THAT AGREEMENT, OR TO FURTHER ANY SIMILAR AGREEMENT EXISTING WITHIN THE PERIOD OF LIMITATION.

If these overt acts are to be taken into consideration, it will be seen, not only that there is no attempt to charge a renewal of the original conspiracy thereby, but that none of them was of such a character as that it could have so operated, because the object of the conspiracy had been long since fully effected.

Respectfully submitted,

JOSEPH H. CHOATE,
DE LANCEY NICOLL,
JOHN M. BOWERS,
JOHN D. LINDSAY,
Of Counsel.

November, 1910.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1910.

No. 390.

Office Supreme Court, U. S.
FILED.
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CLERK.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

GUSTAV E. KISSEL AND THOMAS B. HARNED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR HARNED.

LEAVITT J. HUNT,
GEO. WHITEFIELD BETTS, Jr.,
Of Counsel for Defendant Harned.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1910, No. 390.

THE UNITED STATES, Plaintiff-in-Error,

vs.

GUSTAVE E. KISSEL and THOMAS B. HARNED,

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF DEFENDANT HARNED.

This writ of error brings up for review the judgment of the Circuit Court of the United States for the Southern District of New York, over-ruling the demurrer of the United States to please in bar interposed by the defendants Harned and Kissel, sustaining such pleas as sufficient in law and dismissing the indictment.

The defendants Harned and Kissel filed separate special pleas in bar to the indictment (Rec., pages 32, 34; 52, 54), setting up the defense of the Statute of Limitations. The United States demurred to defendants' pleas upon the ground that the facts set forth in each plea constituted in effect a plea of not guilty and demanded judgment that the pleas be held insufficient in law and over-ruled (Rec., pages 54, 55).

The defendants duly joined issue on the demurrers and duly brought the same on for argument (Rec., pages 55, 56). The Court thereupon adjudged that the demurrers

of the United States be over-ruled and that the pleas be severally sustained as insufficient in law and that the indictment be dismissed (Rec., pages 62, 63). The order and judgment over-ruling the demurrer, sustaining the plea and dismissing the indictment, were re-settled upon application of the United States (Rec., 65, 66) and an order was entered certifying that no application or motion was made to the Court at any time by the United States for leave to file replications to the allegations of the defendants' special pleas in bar (Rec., pages 69, 70).

For further and complete statement of the facts we pray leave to refer to the brief on behalf of defendant Kissel, in order to avoid unnecessary repetition.

POINT I.

THE DEFENSE OF THE STATUTE OF LIMITATIONS MAY BE SET UP BY A SPECIAL PLEA IN BAR IN CRIMINAL CASES IN THE FEDERAL COURTS.

The following authorities show that the defense of the Statute of Limitations was actually set up by a special plea in bar. In the Government's argument and brief below this proposition was conceded, and it is not seriously contended in the present brief, that the plea is not permitted.

United States vs. Cook, 17 Wall, 168.
United States vs. Norton, 91 U. S., 566.
United States vs. Hirsch, 100 U. S., 33.
United States vs. Irvine, 98 U. S., 450.
United States vs. Hewecker, 79 Fed., 59.
United States vs. Brace, 143 Fed., 703.
Bishop's New Crim. Pro., Vol. 1, Sec. 799.

The case of the defendant Harned is peculiarly one where the general rule permitting this defense to be set

up by special plea should be applied, and well illustrates why the Statute of Limitations itself, specifically directs *that no person shall be "prosecuted, tried or convicted"* if three years have elapsed, after the commission of the alleged offense.

It will be seen that not a single act is alleged, either in the offense charged or among the overt acts charged, to have been done by the defendant Harned since December 30th, 1903, more than five years before the finding of the indictment. Neither is it shown or alleged that he did any act or thing directly or indirectly whatsoever since 1903 in pursuance or furtherance of, or to effect or tending to effect the said conspiracy, or that he had any knowledge of or in any way participated in or ratified any of the alleged acts of others.

It needs no argument to show the unfairness of compelling the defendant Harned to try his defense of the Statute of Limitations, at the same time and before the same jury, before which all the other defendants might be tried under the general issue. It would be practically impossible for a jury to differentiate the testimony and documentary evidence, so as to distinguish between the issues.

Furthermore, if the Government were permitted to put in its evidence in regard to the alleged criminal offense, is it fair to assume that the defendants should sit meekly by and not disprove such evidence? Patently the expense and stigma of a trial would have to be incurred, even though they should be declared innocent, or it should be found that they could not be convicted because of the statute. Also what would become of the specific mandate of the statute that they shall not be prosecuted or tried, unless the indictment be found within three years of the alleged offense.

The intent and purpose of the Statute is not to

impose a stigma upon the person setting it up; it is not a confession of the alleged crime; it is rather a direction that a defendant need not answer or even be compelled to prepare for trial for the alleged offense unless the indictment is found within three years of the commission thereof.

It is analogous to pleading the Statute of Limitations in a civil action for debt, the purpose of pleading the Statute being not to relieve the defendant from paying a just debt or to compel him to admit that he owed the debt, but is rather to prevent the defendant from undertaking the burden of obtaining or preserving evidence such as receipts, etc., to prove payment more than six years previous to the beginning of the action. The reason for such a protection to defendants in criminal cases, where the liberty of the citizen is involved, is even more apparent than in civil. The death of witnesses, the loss of memoranda or books, and the failure of memories, are among the reasons which have brought about such beneficent legislation.

For further authorities and arguments in support of this proposition, we pray leave to refer to the brief of the defendant Kissel.

POINT II.

ADMITTING, FOR THE PURPOSE OF ARGUMENT, THAT THE DEFENDANT HARNED'S PLEA IS IN THE NATURE OF A PLEA OF CONFESSION AND AVOIDANCE OR DEMURRER; INASMUCH AS THE INDICTMENT FAILS TO ALLEGE ANY FACT SHOWING THAT THE ALLEGED CONSPIRACY EXISTED OR WAS IN OPERATION, IN SO FAR AS THE DEFENDANT HARNED IS CONCERNED, WITHIN THREE YEARS PRIOR TO THE INDICTMENT, THE PLEA WAS PROPERLY SUSTAINED, AND THE INDICTMENT DISMISSED.

Although there are fourteen counts to the indictment, they relate to the same acts and the argument may be

confined to the first count as it is equally applicable to all the other counts, relating to the alleged conspiracy.

The counts for monopolizing and attempting to monopolize trade are apparently abandoned by the Government.

To summarize briefly the first count of the indictment, it sets out that six of the defendants were directors of the American Sugar Refining Company during six years prior to the indictment, and that during the said time the said Company was engaged in Interstate trade and commerce in refined sugar and controlled 90% of such business (Rec., pages 3, 4); that on December 30th, 1903, the Pennsylvania Sugar Refining Company was ready for business and from that time would have carried on its business in competition with the said American Company, but for the unlawful and corrupt conduct as thereafter described of said defendant corporation, its directors, and of the other individual defendants (Rec., page 4).

It then charges the offence of agreement:

It charges in substance that on the 30th day of December, 1903, and continuously and at all times during said period of six years, to wit: from that day until and on the day of the finding of this indictment, the defendants have engaged in an unlawful and corrupt conspiracy among themselves in restraint of trade and commerce by the means and practices described in substance as follows:

FIRST.—That the defendants had knowledge that one Segal had the controlling interest in the stock of the Pennsylvania Sugar Refining Company and that they *were to get* from said Segal, the possession of said stock and authority to vote the same, and thereby secure the power of control over, and the management of said Pennsylvania Company, for the term of at least one year from the 4th

day of January, 1904, by means of a loan to said Segal, the details of which are therein set forth.

SECOND.—That when the power of control over the management of the Pennsylvania Company, should be so acquired, the defendants *were to use every means* in their power to extend said term and said power of control beyond the one year, by keeping said Segal involved in debt and his affairs in such condition as to prevent him from paying off his obligations to them and by arbitrarily refusing to accept payment of such obligations.

THIRD.—That when the power of control of the Pennsylvania Company should be so acquired, the defendants *were to make use of* the same to prevent the said Company from engaging in or carrying on its business which it was organized to carry on, and thereby bring about the ruin of said Pennsylvania Sugar Refining Company and thus eliminate the competition with the American Sugar Refining Company, which would have come into existence through the operation of the said Pennsylvania Sugar Refining Company.

Nothing is added to the alleged offense in the last paragraph of the first count (Rec., page 18) by the allegation that throughout the period of three years next proceeding the finding and presentation of this indictment that the defendants engaged in a conspiracy in restraint of trade, because there are no additional facts alleged, and furthermore it specifically states that it is "in the manner and form aforesaid."

We will discuss the allegations of the indictment to show:

A. Even if there be such a thing as a so-called continuing conspiracy, as no such conspiracy is alleged, it is unnecessary for the purpose of the present case to pass upon the question whether there can be such a conspiracy.

B. That as the only offense alleged occurred in 1903, and under any construction is shown to have been completed before January 5th, 1905, it is unnecessary to consider whether the statute runs from the first or last overt act, or whether such acts constitute a renewal of a previous conspiracy or are evidence of a continuing conspiracy.

C. That no offense is charged within the statutory period, and therefore it is unnecessary for the purposes of this case to pass upon the question whether a plea in bar, may or may not traverse time.

A.

Admitting for the purpose of argument that there be such a thing as a continuing conspiracy as contended by the Government, yet, as the indictment totally fails to allege facts showing such offense, it is unnecessary to pass upon the question as to whether there can be a so-called continuing conspiracy.

The theory of the Government is that a crime may be committed under the Sherman Act by the meeting of minds in an agreement, the purposes of which are unlawful, even though the purposes are not carried out and no overt act is shown or alleged.

The broadest possible effect that can be given to the offense charged, is that the defendants on December 30th, 1903, entered into an agreement whereby they were to get control of the Pennsylvania Sugar Refining Company for a period of one year from January 4th, 1904, and thereby they were to eliminate it from competition with the American Sugar Refining Company; also after getting control that they were to use every means in their power to continue said control beyond the period of one year.

There is absolutely no allegation in the charging part of the indictment that the conspirators did get control; that they exercised any control; that they did prevent the Pennsylvania Sugar Refining Company from opening; that they did eliminate it from competition, that they had or did use any means in their power to extend the period of one year from January 4th, or even that the refinery was ever closed, or ever ceased its operations or refrained from competition.

In fact the only offense alleged is that they were to do something. The offense charged is not what they were to do, but it was *because they had entered into an agreement*, the purposes or result of which, if carried out, would be unlawful.

The indictment after charging the defendants with entering into the conspiracy, charges that they continued to conspire down to the time of the indictment. This is the only allegation under which it can even be claimed that any sort of an offense, other than the alleged specific agreement of December 3rd, 1903, is charged.

Although the overt acts set up certain facts, the Government properly states that the overt acts cannot be taken as a part of the offense charged; they must be totally disregarded in determining what the offense charged is.

The purpose of alleging overt acts under Section 5440 of the Revised Statute was in order to maintain a prosecution; under the Sherman Act, which requires no overt acts, they might be proper to substantiate the nature or character of the offense charged, or as evidence of a renewal of the offense, so far as concerns the party participating therein, provided the offense charged sets up facts to which the overt acts were applicable.

If, in the present case, the indictment had alleged facts in that part charging the offense to show activity of the alleged continuing mental condition, such as that they did

get control and did prevent the refinery from opening, then the facts in the overt acts might have some bearing in the nature of evidential facts to substantiate the offense charged, and the allegation that such offense continued might have some meaning if a renewal were claimed, but where such facts showing activity are not set forth in the offense charged, they cannot be read into the offense from the overt acts, as admittedly the overt acts or the facts therein contained are no part of the offense charged.

It is conceded by the Government that the overt acts or the facts therein alleged cannot be used to change the character of the offense charged, or show when it occurred. Even under Section 5440 of the U. S. Rev. Stat. where an overt act was necessary before criminal prosecution could be maintained, the overt act was no part of the offense charged, and clearly under the Sherman Act, which requires no overt act, neither such acts or any of the facts therein contained can be taken as a part of or to enlarge the offense charged.

That the charging part of the indictment for conspiracy must be sufficient in itself without regard to the purposes or intents, or overt acts, especially under the Sherman Act, and where it is not claimed they constitute a renewal, is well illustrated by the following cases:

> Commonwealth vs. Bartilson, 85 Pa. St., 482, 486.
>
> United States vs. Britton, 108 U. S., 199, 204.

"The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely

affords a *locus penitentioe,* so that before the acts done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that in an indictment for conspiracy under Section 5440, the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy. Reg. vs, King, 7 Q. B. 782; Commonwealth vs. Shedd, 7 Cush. 514."

People vs. Mather, 4 Wend., 229, 264, speaking of conspiracy, the Court stated:

"It is not a mental offense; it does not consist in intents and imaginations. It exists where there are no overt acts *other than the agreement."*

Dealy vs. United States, 152 U. S., 539, 547.
Pettibone vs. United States, 148 U. S., 179, 202.
Williamson vs. United States, 207 U. S., 425.
United States vs. Hess, 124 U. S., 483.
Lidbitter vs. United States, 170 U. S., 606.
United States vs. Cruckshank, 92 U. S., 542, 558.

It is therefore conclusively shown, which apparently is not contradicted, that the conspiracy charged was the agreement of December 30th, 1903, whereby the conspirators had agreed that they were to do something; the offense was not what they were to do, but because they had agreed that they were to do something, if carried out would be unlawful.

However, the Government contends that by merely alleging that this agreement of December 30, 1910, continued down to the date of the indictment, is a sufficient state-

ment of fact to show that an indictable offense was alleged, each and every day from December 30, 1903, to the date of the indictment, July 1, 1909.

True, there is an allegation that after the conspirators should have acquired control for the term of one year "they were to use every means in their power to extend said terms and power of control," but this patently is not an allegation of any fact showing that the alleged offense continued. The offense was not the getting control; that fact is not even alleged. The offense was the agreement that they were to get control, etc. Furthermore, there is no allegation that they ever exercised control or that the term was ever extended.

Therefore, the Government must stand or fall on the bare allegation that the offense continued. It apparently is conceded by the Government that there is no fact alleged showing that the alleged conspiracy continued other than the bare allegation that it did continue; hence unless the Government's contention, that this is an allegation of fact, is sustained, it has failed to allege a continuing conspiracy.

It is a significant fact that the Government failed to allege as a part of the offense charged that the parties did obtain control over the Pennsylvania Sugar Refining Company or prevented it from conducting its business, or that they did eliminate it from competition in restraint of trade with the American Sugar Refining Company. This omission was not an oversight, neither was it made through mistake or inability on the part of the Government to charge as the alleged offense that the parties actually acquired control and prevented the refinery from opening and thus eliminated it from competition, which the known facts might have warranted; on the contrary it was done in a deliberate attempt on the part of the Government to avoid charging an alleged crime that might have been

charged from the known facts, because it was self-evident that such a crime was barred by the statute.

It is further worthy of note that the Government set up the facts from which the offense that the defendants actually prevented the refinery from opening, etc., might have been alleged under the overt acts, and at the same time strenuously invoked the rule, which is undoubtedly good law, that the overt acts or the facts therein contained are no part of the offense charged. The patent reason for invoking this rule is because, if those facts were considered, it would be evident that the alleged crime was complete December 30th, 1903, or in any event before January 5th, 1905.

As a matter of fact inasmuch as the Government concedes, in fact urges, that in order to constitute a conspiracy under the Sherman Act, no overt acts need be alleged or shown, it is difficult to comprehend why the overt acts were set up at all, unless for the purpose of using the facts contained therein, in argument, in confusing the offense charged with the result thereof.

It is not clear whether the Government takes the position squarely, that if an agreement constituting a crime is alleged to have been made in 1903, then it is alleged that that agreement lies dormant in the minds of the conspirators in 1909, that that mental condition is an offense susceptible of prosecution and punishment under the Sherman Act. Nevertheless, this is the position it must take under the offense they have seen fit to allege, because as the only offense alleged is the meeting of minds on December 30th, 1903, it conclusively follows that the word "continued" refers to the continuance of the previous mental condition.

To further illustrate, in the present case, the allegation that the defendants engaged in an unlawful and corrupt conspiracy among themselves on December 30th, taken in

connection with that part of the indictment charging the offense, viz: that they were to get control, etc., is an allegation of fact susceptible of proof; but in the absence of alleging any other facts or series of facts, it clearly cannot be said that the specific offense charged is changed into a different offense or series of offenses by the use of the word "continue," and hence the word "continue" must refer to the alleged mental condition of the minds of December 30th, 1903.

It is undoubted law that the bare allegation of mental condition of a person or persons is not in itself an allegation of crime; there must be some activity culminating in a demonstration susceptible of being alleged as a fact, and proved, such as a written agreement or the coming together in an oral understanding, and as there is no fact alleged in the charging part of the indictment showing any act to have been done or that there was any further mental activity, beyond that of December 30th, the insertion by the pleader of an allegation that this mental condition continued necessarily is nothing more than his belief unsupported by any fact, and is mere surplusage or conclusion.

That the public prosecutor cannot change the facts constituting the offense into a so-called continuing offense by so framing his indictment charging the agreement to commit the offense rather than the offense, and thus deprive the defendant from setting up the Statute, is well illustrated in the opinion of the learned District Judge in delivering the opinion in this case below, where he stated:

> "There seems to be an increasing tendency in recent years for public prosecutors to indict for conspiracies when crimes have been committed. A conspiracy to commit a crime may be a sufficiently ser-

ious offense to be properly punished; but when a crime has been actually committed by two or more persons, there is usually no proper reason why they should be indicted for the agreement to commit the crime instead of for the crime itself. A large class of federal prosecutions for commercial offenses, such, for instance, as violations of the interstate-commerce act, the Sherman Act, the bankrupt act, the acts relating to public lands, and many others, now habitually take the form of indictments for conspiracies to commit crimes, the actual commission of which is also usually alleged in the indictment. Prosecutors seem to think that by this practice all statutes of limitations and many of the rules of evidence established for the protection of persons charged with crime can be disregarded. But there is no mysterious potency in the word conspiracy. If a conspiracy to commit a crime has been carried out, and the crime committed, the crime, in my opinion, cannot be made something else by being called a conspiracy. The men who have committed the crime are liable to whatever penalties the law imposes, and to whatever protection the law affords. If the statute of limitations is a bar to a prosecution for the crime, that bar, in my opinion, cannot be lifted by a prosecution for a conspiracy to commit that crime. Statutes of limitation are beneficial Statutes. The interest of the community and justice to persons charged with crime require that offenses be promptly prosecuted. Statutes of limitations should be given a plain and sensible construction. Their effect should not be frittered away by a strained interpretation, based on subtle and refined reasoning. The Government has waited, before bringing this prosecution, for five years and a half after the alleged offense was complete, and, in my

opinion, the statute of limitations is a bar to this indictment" (Rec., pages 50, 51).

The Government having charged as the offense the conspiracy or agreement to do something rather than what was done, it is submitted that it cannot change the facts constituting the offense by confusing in argument the purposes or result of the offense with the offense; the result may continue forever or the purpose may have been accomplished after a long time, or may never be accomplished, yet the only offense charged in this action is complete on December 30th, 1903, and hence it could not continue. In other words, because the Government chooses to term a given statement of facts as constituting a continuous crime, it does not conclude the Court from the consideration of those facts, and if from the facts alleged there could be no continuing offense, necessarily the allegation that it continued is mere surplusage.

Furthermore, even if the mental condition did remain unchanged, that is not a punishable offense and hence the allegation is mere surplusage.

If a contract were alleged to have been entered into on December 30th, 1903, and it was then alleged that it continued down to 1909, such an allegation might be termed an allegation of fact that the contract was an enforceable obligation in 1909; that is to say, the agreement that was enforceable was the agreement of December 30th, 1903. So in the present case it might be said to be an allegation of fact that the wrongful agreement of 1903 was in force in 1909 and the defendants could be prosecuted and tried under such a charge were it not for the Statute of Limitations. However, they would not be prosecuted or tried for any fanciful condition of mind in 1909,—they would be tried for the offense charged in 1903, and the word continued would not be an allegation of any fact, showing that any offense other than the

specific offense charged in 1903 was in existence or continued. Because an agreement is enforceable over a period of time, that does not mean that the parties are entering into an agreement continuously. The only purpose of such an absurd and strained construction could be to nullify the statute of limitations for the benefit of a delinquent prosecutor.

In U. S. vs. Macandrews & Forbes Co., 149 Fed. Rep., 823, at 830-1, the court stated: The Sherman Act is "not directed against a state of minds but against a state of facts."

In Mulcahy vs. Reg., L. R., 3 H. L. Cas., 306, 317, the court stated:

> "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. *So long as such a design rests in intention only, it is not indictable.* When two agree to carry it into effect, *the very plot is an act in itself.*"

Further, if the pleader can, after alleging as the crime the meeting of minds to do something, by simply alleging that that offense continued, prevent the defendant from setting up the statutes of limitations, the question whether the statute could be pleaded would not depend upon the facts alleged, but upon whether the pleader chose to state that it continued. In fact, if the pleader conscientiously believed that the conspirators continued of the same conviction, he could by simply alleging continuity without alleging any facts showing any further active meeting of the minds and without ever being able to prove any other fact, unless the conspirators confessed as to their mental condition, prevent them from pleading the statute.

It must be conceded that the offense charged, that they were to do something, cannot be changed into an offense

that they did something, by using the word "continuing." The Government is, therefore in the position, if the alleged conspiracy continues in the year 1909, of charging these defendants with the offense, that they were to get control of the stock and were to prevent the Pennsylvania Sugar Refining Company from opening in 1909. This further illustrates the absurdity of the contention that the alleged conspiracy in the present case could be a continuing conspiracy, because if the facts set forth in the overt acts are true, which show that they obtained control and took action to prevent the refinery from opening in 1903, they would be tried for conspiring to do something in 1909, which had already been done in 1903.

To further illustrate in that part of the indictment charging the offense, it will be seen that not a single fact is alleged to show any mental or physical activity since December 30th, 1903, therefore, the only offense charged to continue, even admitting that the word "continue" is a proper allegation of fact, is an alleged dormant mental intention, but as this is not a crime, it conclusively follows that no continuing offense is charged, as, if the offense referred to is not an offense, it cannot be said that the offense continues and hence the word continued is mere surplusage.

Although this discussion as to what the indictment charges may appear to be refined and technical, it will be seen that it goes to the very merits of the question involved and it is brought about, not through any effort of the defendant to avoid meeting on the merits any crime alleged, but by reason of the Government's endeavor to charge an offense which does not exist, by avoiding a plain statement of the facts constituting what in reality it should have alleged to have been the crime, which patently would have been barred by the statute.

To summarize, our position is that even admitting that the word "continue" may be a proper allegation of fact in

some instances, as the fact to which it refers in the present case is a mere dormant mental condition, which cannot constitute an offense, it cannot be said that a continuing offense is alleged.

Therefore, whether a conspiracy may or may not be continuing offense or whether the word "continuing" may or may not be an allegation of fact, is unnecessary to be determined in order to decided the present case, because the facts which the government has seen fit to set up as constituting the offense, show that such an offense could not have continued, but was complete on December 30th, 1903.

B.

There is no question involved in the present case as to whether the statute runs from the first or last overt act; it is not even claimed that they show any renewal, and as it is conclusively shown above that the offense charged could not be a continuing one but was complete on December 30th, 1903, necessarily the statute commenced to run on that day.

In fact, in the present case, inasmuch as admittedly overt acts are unnecessary under the Sherman Act and it is not claimed that they constitute a renewal, or that any renewal is charged, they amount to mere surplusage.

Hazen v. Com., 23 Pa. St., 355 at 366.
Dealy v. U. S., 152 U. S., 539.
United States v. Britton, 108 U. S., 199, 205.

C

It is unnecessary for the purpose of this case to pass upon the question whether a plea in bar may or may not traverse time.

It necessarily follows that inasmuch as the indictment as shown in sub-division "A" charges no offense other than the completed offense of December 30th, 1903, and inasmuch as the Government does not even contend that there was any renewal of that offense charged, it necessarily follows that no time was charged subsequent to Dec. 30th, 1903, hence the plea did not traverse any allegation of time, and the question is not involved in the determination of the present case.

That the Government cannot be calling the offense a conspiracy and stating that it continued, read into the offense charged, facts that do not exist, is further illustrated by the opinion below of Judge Holt, where the purposes of the alleged offense were evidently considered including the overt acts (which it is shown cannot be done), yet, nevertheless, the entire offense is shown to have been completed in any event on January 4th, 1904.

> "It is also conceded that the execution of the contract between Kissel and Segal, by which the loan was made and the control of a majority of the stock of the Pennsylvania Company obtained, the consent of the Champion Construction Company to the pledge of the stock, the power of attorney by that company to Kissel, the election of the new directors, the meeting of the new board, at which the vote was passed that the Pennsylvania Sugar Refining Company should thereafter refrain from carrying on business until the further order of said board, the advance of $1,250,000 by The American Sugar Refining Company to Kissel, and the loan of that amount by Kissel to Segal *were all done, and the entire transaction closed in all respects on or before January* 4, 1904. *Therefore, the offense alleged in this indictment was complete, and this indictmnet might have been brought on January* 5th, 1904" (Rec., page 57).

In conclusion, without considering the effect of the plea, (except the allegation that the defendant was not a fugitive from justice) and the demurrer thereto, and irrespective of whether a conspiracy may be a continuing offense, or whether the first or last overt act is to be taken as the time from which the statute begins to run, or whether a conspiracy is a renewable offense, or whether a plea in bar may or may not traverse time; are all matters unnecessary to be passed upon for the determination of the case before the Court, because from the facts in the present case it is shown that no continuing or renewable offense is alleged; the only offense alleged is that of December 30th, 1903, from which time the statute begins to run.

POINT III.

Even if the overt acts are available under the offense charged (although as we have seen they are not) yet, the facts alleged fail to show the commission, the existence, or the continuance of any crime within three years against any of the defendants, and certainly as against the defendant Harned.

Admitting for the purpose of argument that the allegations of the indictment are sufficiently broad to permit the alleged overt acts to be considered in order to show that an alleged offense was committed within three years from the finding of the indictment, and that the facts in the overt acts may be read into the indictment as a part of the offense charged [which disregard the rule that the material facts must be set out in the charging part of the indictment and recourse can-

not be had to the overt acts and that a crime cannot be charged by inference, etc., U. S. vs. Britton, 108 U. S., 199, 205; U. S. vs. Hess, 124 U. S., 483; Hazen vs. Com., 23 Pa. St., 355; Ex parte Bain, 121 U. S., 1; 10] and admitting further that the authorities which hold that the statute begins to run from the last overt act should govern, and disregarding the plea other than that the defendants were not fugitives from justice, yet nevertheless, no crime is shown to exist within the statutory period.

Solely for the purpose of abbreviating the argument by assuming that some or all of the overt acts up to May 3rd, 1905, the date of the last overt act alleged prior to the commencement of the three-year period (July 1st, 1906), before the finding of the indictment (July 1, 1909), show or tend to show the existence of a conspiracy (although it is apparent that they do not), we then come to the proposition, do any of the overt acts alleged to have been done within the statutory period show that they were done to effect the object of the conspiracy, (a) as to any of the defendants; (b) as to the defendant Harned.

We submit that it is shown from the brief of the defendant Kissel, to which we pray leave to refer, that the overt acts did not effect the object of the conspiracy and therefore could not have operated to show the continuance of the offense or its renewal.

As to the defendant Harned, disregarding the fact that the Government in its demurrer admitted the allegation of the defendant Harned's plea, denying "that the conspiracy existed within the three years or that the said defendant had done any act or thing or committed any overt act, directly or indirectly in pursuance or in ratification of or to effect, or tending to effect, the objects of any conspiracy, or in furtherance of any offenses set forth in the indictment, and that the acts and things alleged to have been done within said period of three years by others were not

acts or things in aid or furtherance of or to effect, or tending to effect the object of the conspiracy and that said acts were not done with defendant's knowledge or consent, participation, agreement, authority or ratification," and admitting the theory of the Government in toto, it has failed to show that any crime is alleged or is charged against Harned since 1903; unless possibly it can be said that the counsel's argument is sound, that the burden is on defendant to show that he has purged his mind of an alleged evil intent; such practice, however, is unknown to the criminal law even since the early Roman days, with the possible exception of the prosecution for witchcraft, when persons were burned at the stake for failure to disprove alleged mental operations.

There is absolutely no overt act charged as having been done by Harned since December 30th, 1903, more than five and one-half years prior to the finding of the indictment; and the overt acts within the three year period not only do not tend to affect the object of the conspiracy, but do not show or tend to show that Harned directly or indirectly, or even by inference, had anything to do with such acts. Neither is it alleged that the acts of others were done with his knowledge or consent, participation, agreement, authority or ratification; in fact by the demurrer, it was admitted by the Government that they were not done with such knowledge or participation etc. From the argument of counsel, it apparently is not seriously contended that these overt acts of others are shown to in any way connect Harned, directly or indirectly, or even by inference. It is therefore difficult to comprehend upon what theory they could have been said to show an offense against Harned, or operate to start the statute running.

Also, as is apparent as shown by the Government's brief, that as to the defendant Harned, inasmuch as he is not shown to be connected directly or indirectly or by inference

with any of the alleged acts or even the purposes of the alleged offense, for more than five and one-half years before indictment was found; the Court might well find that as to him, upon any theory, that the conspiracy had been abandoned; furthermore as to him the Government apparently does not impute this extraordinary theory that he should forever disprove his alleged mental condition, unsupported by any fact that it continued.

The effect of considering the overt acts in the present case was passed upon by the Circuit Court below in the following language:

> "If this indictment had charged, in the language of the act, that the defendants had made a contract in restraint of trade, I suppose no one would claim that the statute of limitations did not begin to run upon the execution of the contract. How can the Government impose a different liability on the defendants by calling the same thing a conspiracy? I think that the offense was complete in this case when the contract between Kissel and Segal was made. It was unquestionably complete before January 5, 1904, before which date the contract was carried out in all respects, and the object accomplished. If, however, the doctrine of the class of cases which hold that each new overt act constitutes a new offense, in prosecutions under sec. 5440, were to be followed in this case, the overt acts alleged to have occurred within three years, necessary to constitute a new offense, must be acts which have a tendency to carry out the object of the conspiracy, or in some way tend to make it effectual (United States vs. McLaughlin, 169 Fed., 307; United States vs. Black, 160 Fed., 431); *and each defendant must have participated intentionally in an overt act done within three years prior to the indictment* (*Ware* vs. *United States*, 154 *Fed.*, 579). *So far as the defendant Harned is*

concerned, he had nothing to do with any overt act alleged in the indictment after December 30, 1903. As to the defendant Kissel, the overt acts alleged in the indictment as occurring within three years before it was filed, in my opinion, are not acts which had any tendency to carry out the object of the conspiracy, or to make it effectual. * * * In my opinion these alleged overt acts had no tendency to accomplish the object of the conspiracy" (Rec., pages 59, 60).

Therefore even by considering the facts alleged in the overt acts, it is conclusively shown that no offense is alleged as against the defendant Harned within the statutory period of three years.

POINT IV.

The indictment was properly dismissed.

The authorities show that where a special plea setting up the Statute of Limitations is demurred to by the Government, and the special plea is sustained, the whole proceeding is, as a rule, terminated.

United States v. Hewecker, 79 Fed. Rep., 59, 65.
United States v. Norton, 91 U. S., 566.
United States v. Hirsch, 100 U. S., 33.

For example, in U. S. vs. Norton (supra), it appears at page 569 that the negative answer of the Supreme Court to the question certified to it by the Circuit Court viz: Whether the defendant could be prosecuted, tried or punished where the indictment was not found within two years of the committing of the offenses (the question having arisen on demurrer to the plea of the Statute of Limita-

tions), *was equivalent to a termination of the whole prosecution.*

Again in U. S. vs. Hirsch, 100 U. S., page 33, where the Statute of Limitations was set up by special plea in bar to a prosecution under Section 5440, Rev. Stat, and the Government demurred to the plea, the Supreme Court certified to the Circuit Court "that the plea of the Statutes of Limitations of three years *is good in bar of the first two counts of the indictment*" (Opinion of the Court by Miller, J., page 36).

It is evident that the Supreme Court, having so certified to the Circuit Court, the Circuit Court was bound by the opinion to hold that the Statute *was a bar* and this necessarily terminated the whole proceeding.

Where the question of the bar of the Statutes of Limitations can be disposed of in this way, on demurrer to the special plea, this is obviously the proper course to pursue, for it recognized the mandate of the Statute that not only shall no person be punished for any offense not committed within the three years, but that no person shall be *prosecuted or tried for the same.*

Furthermore an examination of the indictment and the plea of the defendant Harned will show that there is really no dispute as to the facts, between the Government and the defendant. The only overt acts charged against the defendant Harned are the signing of the consent of the Champion Construction Company, of which he was President, to the use of its stock under the loan, and the signing of the proxy to vote such stock [Rec., page 107]. These acts are shown to have been committed on December 30th, 1903.

As to the other alleged overt acts charged to have been committed by some of the other defendants, subsequent to the beginning of the three year period, there is no statement or intimation in the indictment that the defendant

Harned ever authorized, participated, ratified in or even had any knowledge of such facts.

Irrespective of the fact that the Government did not ask leave to plead over as the ruling involved a matter of discretion of the Court below, no case of abuse of such discretion can possibly be shown, and hence the judgment should be sustained.

Furthermore, as is conclusively shown by the brief of the defendant Kissel that if no error was committed in the Court below, the final judgment should not be reversed simply to permit the United States to plead over.

We pray leave to refer to this point and the other points in the brief of the defendant Kissel and that they may be taken as a part hereof in order to avoid repetition.

CONCLUSION.

For the foregoing reasons, the judgment below should be affirmed on the ground that the Trial Court committed no error.

November , 1910.

LEAVITT J. HUNT,
GEO. WHITEFIELD BETTS, Jr.,
Of Counsel for Defendant,
Harned.

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